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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE:

GRAND JURY PROCEEDINGS

BANK OF NOVA SCOTIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 11, 1983

Question Presented for Review

Shall the judicial power of the United States be exercised to coerce a foreign national, who lawfully conducts business in the United States, to act unlawfully in a third country, when there has been no showing that the national interest requires such exercise?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at 691 F.2d 1384 (11th Cir. 1982) and is reproduced as Appendix A. The opinions of the United States District Court for the Southern District of Florida dated June 11, July 6 and July 10, 1982, are unreported but are reproduced as Appendix B. The judgment of the United States Court of Appeals for the Eleventh Circuit is unreported, and is reproduced as Appendix C.

Jurisdiction

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on November 29, 1982. A petition and suggestion for rehearing *en banc* was denied on January 6, 1983 (Appendix D). This petition was filed within ninety days of that date. The Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1)(1976).

Statutes and Regulations Involved

This case involves the due process clause of the fifth amendment to the United States Constitution, U.S. Const. amend. V., which is reproduced in Appendix E. It also involves the Civil Contempt Statute, 18 U.S.C. § 401 (1976), which is reproduced in Appendix F. A statute which is also related to this case is Section 10 of the Banks and Trust Companies Regulation Act of 1965, 1965 Bahamian Acts No. 64, *as amended* by the Banks and Trust Companies Regulation (Amendment) Act 1980. It is reproduced in Appendix G.

Statement of the Case

This is a case in which a court in the United States has exercised its discretion to penalize a citizen of Canada for its refusal to violate the criminal laws in a third nation, without any showing of the necessity or relevance of such an order to any interests of the United States.

The Bank of Nova Scotia (the "Bank") is a Canadian chartered bank established 150 years ago with 1,027 Canadian branches and over 200 branches, offices and agencies in 45 other countries. The U.S. Attorney's Office for the Southern District of Florida caused a subpoena duces tecum to be served on the Bank's Miami, Florida agency on September 23, 1981,

calling for the production of certain customer records located at the Bank's Nassau, Bahamas Branch.[1] The Bank declined to produce the documents on the ground that Sections 10(1) and (3) of the Bahamas Banks and Trust Companies Act, 1965, *as amended* ("the Act"), prohibit disclosure of customer records by an officer of the Nassau Branch without the consent of the customer, save for three narrow exceptions that do not apply here (Aff. of P. Graham ¶ 4, reproduced in Appendix H, *infra* at 2h). Both the district court and the Eleventh Circuit[2] recognized that the Bank would be subject to criminal penalties in the Bahamas if it produced the documents. A violation of the Act is punishable by up to two years' imprisonment and a fine of $15,000 (Bahamian).

In this matter, the Bank is a neutral source of information and has not been accused of any wrongdoing. At no time has it been a target of the investigation.

The Bank has done everything in its power under the applicable laws to comply with the subpoena. It has sought but has not obtained a waiver by its customer of the customer's rights under the Act. The Bank does not have standing under Bahamian law to apply to a Bahamian court for an order permitting the release of customer information. The Department of Justice (the "Department") does have standing to apply for such an order (Aff. of P. Graham ¶¶ 6,7, *infra* at 3h), and appears to have grounds for such an application based on possible violations of United States narcotics laws (Aff. of P. Graham ¶ 8, *infra* at 3h). The Department has declined to make any application to the Bahamian courts, and has also failed to make any showing before the district court that the

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1 The documents relate to an individual and to two corporations. The subpoena originally called for similar documents from the Bank's Antigua Branch. In the interest of avoiding unnecessary conflict, the Bank investigated and found that no such documents exist. Accordingly, that part of the subpoena is not in issue.

2 The jurisdiction of the courts below is based on 28 U.S.C. § 1345 (1976).

documents sought were at all relevant or necessary to the grand jury's investigation.[3]

The district court held the Bank in civil contempt, and the Bank appealed that decision to the Eleventh Circuit. On November 29, 1982, the Eleventh Circuit issued an opinion affirming the district court's order, and the Bank's petition for a rehearing and suggestion for a rehearing *en banc* was denied on January 6, 1983.

Reasons for Granting Writ

This case raises an important question of federal law that has not been, but should be, answered by this Court. The court below answered the question in a manner which conflicts with principles enunciated by this Court, by the other circuits and by Congress.

1. *The Importance of the Question.*

This case requires a determination of the extent to which a municipal court should require a person subject to its jurisdiction to act in the territory of a foreign nation in violation of the criminal laws of that foreign sovereign. The question encompasses issues of constitutional magnitude as to the significance of the domestic or foreign status of the party before the Court, as to the denial of due process, and as to the separation of powers as between the executive and judicial branches of Government. The circuits are sharply divided on the issues raised by this case. The conflict results in a disarray that requires resolution by this Court if federal law is to be declared by a single voice in a consistent manner.

The expeditious resolution of these issues is moreover a matter of international significance. Indeed, the reporters'

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3 The Government produced an affidavit *in camera* to the district court on Janaury 13, 1982 regarding the relevance of the documents. This affidavit was not considered by either the district court or the Eleventh Circuit, and neither court made a finding of relevance or materiality prior to enforcing the subpoena.

notes to the most recent Tentative Draft of the *Restatement of Foreign Relations Law of the United States* observe:

> No aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.

Restatement of Foreign Relations Law of the United States (Revised), § 420, reporters' notes at 18 n.1 (Tent. Draft 3, 1980.)

There is evidence to support those concerns. The validity of discovery orders that require a non-citizen subject to the jurisdiction of the United States to act abroad in violation of the laws of its home or host country has been and increasingly is challenged by statutory and decisional law of the affected nations. The integrity of United States law is called in question by reason of the inconsistency between the extra-territorial effect sought to be given United States judicial process and denial by United States courts of the extraterritorial effect of foreign laws and decrees. The disparate pronouncements of circuit courts, which are discussed hereafter, provide an added basis for the contention that the administration of justice in the United States is predicated upon political expediency rather than upon legal principle.

Related, and of no less importance, is the question of whether the independence of the judicial branch is impaired. That issue comes into sharp focus in this case for the following reasons. The Department of Justice caused the issuance of the subpoena in question on the ground that the grand jury investigation would be aided in some unspecified manner by production of documents located in the Bahamas. When the petitioner declined to produce the documents on the ground that compliance with the subpoena would violate Bahamian criminal law, the controversy was referred to the courts below. The courts below responded to the Department's demands without any examination or finding of the materiality or

relevance of the documents requested and thus, in effect, abdicated their judicial function.

2. *The Conflict with Applicable Decisions of this Court.*

The decision of the panel below disregards principles declared by this Court. Pursuant to the federal act of state doctrine, this Court refrains from examining the acts of a foreign state which take effect within the territory of that state.

This Court's reluctance to question the act of a foreign nation was made evident in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). In that case, the Court declined to examine the validity of the Cuban government's expropriation of property, because the operative act took place entirely within another nation. The Court noted that the doctrine has " 'constitutional' underpinnings" and "arises out of the basic relationships between branches of government . . . in the area of international relations." *Id.* at 423.

Similarly, a court of the United States will not enforce acts of a foreign government which take effect in this country, if those acts are inconsistent with the laws or public policy of the United States. *See, e.g., First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Those principles are offended by an order that requires the Bank to produce records in the Bahamas in violation of that nation's bank privacy statute.[4]

As an adjunct of its recognition of territorial rights of sovereignty, this Court has expressed extreme reluctance to enter any order which would obligate a party to commit an act in a foreign country in violation of the laws or public policies of that nation. In *United States v. First National City Bank ("Omar")*, 379 U.S. 378 (1965), the Court reversed an order of the Second Circuit and reinstated an injunction which had been entered by the district court, temporarily freezing an

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4 The invasion of Bahamian sovereignty is not mitigated if the documents are smuggled out of the Bahamas for production elsewhere.

account in a bank's foreign branch. Writing for the majority, Justice Douglas noted that, if its decision were in violation of foreign law, the district court should review the advisability of its order. He stated:

> For overseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts or their competence. We have, however, no such involvement here, for there is no showing that the mere "freezing" of the Montevideo accounts pending service on Omar, would violate foreign law, cf. *Societe Internationale v. Rogers*, 357 U.S. 197, 211, or place respondent under any risk of double liability. Cf. *Western Union Co. v. Pennsylvania*, 368 U.S. 71. The District Court reserved power to enter any protective order of that character.

Id. at 384. In this case, an order compelling the Bank to produce documents in the Bahamas would place it in direct contravention of foreign law. The Eleventh Circuit's opinion thus disregards the concerns expressed in *Omar*, and indeed this case presents a violation of the due process rights of a foreign national which was not before the Court in *Omar*.

This Court recognizes the importance of respecting foreign privacy statutes, particularly in instances in which a party is subject to conflicting regulations. In *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), the petitioner, a Swiss trading company, brought suit for the return of property seized by the Alien Property Custodian under Section 5 of the Trading with the Enemy Act. The Court reversed an order of the district court, which had ruled that, if the petitioner did not produce certain documents in violation of the Swiss secrecy laws, its complaint would be dismissed. Emphasizing the unfairness of ordering a party to produce documents in violation of foreign law, the Court stated:

> It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this

> excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.

Id. at 211.

The Bank's plight is more extreme than that faced by the parties in *Omar* and *Rogers*. Unlike the *Omar* situation, in which Justice Douglas found that there had been no showing that compliance with the Court's order would place the respondent in violation of foreign law, an order directing the Bank to produce documents in this case would place it in direct violation of the criminal laws of another sovereign nation. In *Rogers*, the Court declined to issue an order which would have placed the petitioner in violation of Swiss bank privacy laws. In that situation, although the bank was theoretically a party seeking relief under the laws of the United States, the Court pointed out that its position was "analogous to that of a defendant," for it was belatedly seeking the recovery of its assets. 357 U.S. at 210.

In this case, the Bank seeks no relief or special privilege under the laws of the United States. It seeks no more than to continue lawfully to conduct business in those countries in which it is licensed to do so, without subjection to orders by one host country which would oblige it to violate the territorial laws of another host country. That limited aspiration is justified under present federal law. This Court should decide whether the law is to be changed.

3. *The Conflict of Decisions by the Circuit Courts.*

The panel decision below is at odds with the prevailing law, as articulated by several circuits, and thus presents a conflict that should be resolved by this Court. The panel conceded that there is a conflict among the circuits regarding the extent to which a court may enforce a subpoena, even in domestic situations, absent a showing by the Government of relevance and materiality of the documents requested. (See n. 5, *infra* at 5a.) This conflict has, in fact, become further exacerbated since the panel rendered its opinion.

In *United States v. First National Bank of Chicago ("Tripplett")*, No. 80-2713 (7th Cir. Jan. 24, 1983), the Seventh Circuit recently reversed a lower court ruling which had ordered the First National Bank of Chicago to produce certain documents from its branch in Greece in violation of that nation's bank secrecy statute. The court applied the balancing test of the *Restatement (Second) of Foreign Relations* in what it described as a "sensitive balancing of the interests at stake." It noted:

> We think it significant in weighing the hardship factor that the Bank employees who would be exposed to penalty and First Chicago, which would be ordering its Greek employees to act unlawfully, are involved only as neutral sources of information and not as taxpayers or adverse parties in litigation.
>
> Although the interest of the United States in collecting taxes is of importance to the financial integrity of the nation, the interest of Greece, served by its bank secrecy law is also important, and so conceded by Government counsel (factor (a)).

The court suggested a distinction of the Eleventh Circuit's opinion herein, noting among other things that the Bahamian statute permits a customer waiver, and the Bahamian courts have the discretion to permit disclosure upon proper application. In fact, in this case, the Bank is also a neutral source of information, rather than an adverse party to the litigation; it has sought and not received a customer waiver, and the Government has declined to apply to a Bahamian court for an order of disclosure. Thus, the Bank has made a good faith effort to comply with the subpoena and is in as difficult a position as the defendant in *Tripplett*.

The court below has also departed from the standard adopted by the Third Circuit. The Third Circuit has recognized that grand jury subpoenas are essentially prosecutorial documents, and so requires the Government to demonstrate in all

cases that the items sought are both relevant and necessary to a pending grand jury investigation. In *In Re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3d Cir. 1973), the court commented:

> [T]hey [grand jury subpoenas] are in fact *almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch*. Grand jury subpoenas then, when they are brought before the federal courts for enforcement, for all practical purposes are exactly analogous to subpoenas issued by a federal administrative agency on the authority of a statute, without any prior judicial control.

Id. at 90 (footnote omitted) (emphasis added). The Third Circuit has concluded that grand jury subpoenas are not entitled to automatic enforcement, and stated that the Government must show "*in every case* that each item sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose." *In re Grand Jury Proceedings ("Schofield II")*, 507 F.2d 963, 966 (3rd Cir.) (emphasis in original), *cert. denied*, 421 U.S. 1015 (1975).

Similarly, the Second Circuit has recognized that grand jury subpoenas are not entitled to automatic enforcement, particularly in situations in which the production of documents would place a party in violation of the laws of a foreign nation. In *United States v. First National City Bank ("Loveland")*, 396 F.2d 897 (2d Cir. 1968), the court affirmed an order directing the Bank to produce certain documents in Germany, in violation of civil law in that country. The court weighed the critical importance of minimizing the potential conflict among nations against the significance of the documents requested in that action, stating:

> It is not asking too much however, to expect that each nation should make an effort to minimize the potential

> conflict flowing from their joint concern with the prescribed behavior. . . . Where, as here, the burden of resolution ultimately falls upon the federal courts, the difficulties are manifold because the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs.

Id. at 901 (citations omitted).

No circuit, other than the court below, has imposed contempt penalties on a third party witness for its failure to produce documents in a foreign nation in violation of the criminal laws of that nation. In *In Re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976), the bank officer from whom the information was sought was physically within the jurisdiction of the court, and the information sought consisted of his personal testimony. Moreover, in those situations in which courts have ordered the production of documents in violation of foreign secrecy statutes, there has been a finding of at least a minimum of purposeful involvement of the subpoenaed party in the activity which was the subject of investigation. In *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981), the court compelled the production of records of a defendant's foreign subsidiary where the defendant was the subject of a domestic investigation. *Accord, Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert.denied*, 429 U.S. 1096 (1977) (defendant was compelled to produce records held by its foreign office where the records were relevant to defendant's alleged violation of federal securities laws).

We are aware of no other circuit which compels a foreign national, accused of no wrongdoing, to produce in violation of foreign criminal law documents which are not shown to be material or necessary to a pending investigation. The opinion below, which affirmed the enforcement of a grand jury subpoena without any analysis of the importance of the docu-

ments sought or of the interests served by the foreign statute, represents so extreme a negation of principles declared by other circuits that it requires review by this Court.

4. *The Departure from the Accepted and Usual Course of Judicial Proceedings.*

The district court departed from the accepted and usual course of judicial proceedings by imposing contempt penalities on the petitioner in the circumstances of this case, and the court of appeals exacerbated as well as sanctioned that departure so as to call for an exercise of this Court's power of supervision. This Court and Congress have long stated their disapproval of extraterritorial adventures such as the one in this case.

Congress has consistently avoided regulatory interference with the internal affairs of foreign countries. For example, in the Bank Holding Company Act, 12 U.S.C. § 1843(c)(9)(1980), Congress exempted bank holding companies which are organized in foreign countries from regulation of their business conducted outside the United States.

The courts have heretofore refrained from imposing contempt sanctions on foreign nationals for refusal to violate their obligations. The reporters' notes to the *Restatement* state:

> No case is known in which a foreign national has actually been fined or imprisoned in the United States for failure to comply with an order to produce documents located abroad, though such sanctions have been threatened a number of times with respect to both U.S. and foreign nationals.

Restatement of Foreign Relations Law of the United States (Revised) § 420, reporters' notes at 26 n.7 (Tent. Revised Draft No. 3, 1982).

In this case, a noncitizen of this country, which is subject to process of our courts only because it lawfully conducts business here, is victimized by a conflict of sovereigns. As Judge

Kaufman observed in *Loveland*, "[A] court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its decision." 396 F.2d at 902. The district court and the court of appeals in this case failed to make any such effort.

Conclusion

This petition for certiorari should be granted and, upon review, the decisions of the court of appeals and the district court should be reversed.

Dated: New York, New York
March 11, 1983

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APPENDICES

APPENDIX A

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

THE BANK OF NOVA SCOTIA,
Defendant-Appellant.

No. 82-5831.
United States Court of Appeals,
Eleventh Circuit.

Nov. 29, 1982.

King & Spalding, Griffin B. Bell, Charles Kirbo, James A. Pardo, Jr., Atlanta, Ga., Steel, Hector, Davis, Burns & Middleton, Talbot D'Alemberte, Thomas R. Julin, Palm Beach, Fla., for defendant-appellant.

Glenn L. Archer, Jr., Michael L. Paup, Charles E. Brookhart, Alan Hechtkope, Asst. Attys. Gen., Tax Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, *Circuit Judges*, and MORGAN, *Senior Circuit Judge*.

LEWIS R. MORGAN, *Senior Circuit Judge*:

The Bank of Nova Scotia appeals from an order of the United States District Court for the Southern District of Florida holding the Bank of Nova Scotia in civil contempt for failing to comply with an order of the court enforcing a grand jury subpoena duces tecum. The Bank of Nova Scotia (the Bank) presents three arguments against enforcing the subpoena. The Bank first contends that there were insufficient grounds to enforce the subpoena. The Bank also contends that enforcing the subpoena would violate due process. Finally, the Bank argues that the subpoena should not be enforced as a matter of comity between nations. We find the Bank's contentions to be without merit, and therefore we affirm the district court.

I. FACTS

The Bank of Nova Scotia is a Canadian chartered bank with branches and agencies in forty-five countries, including the United States and the Bahamas. A federal grand jury conducting a tax and narcotics investigation issued a subpoena duces tecum to the Bank calling for the production of certain records maintained at the Bank's main branch or any of its branch offices in Nassau, Bahamas and Antigua, Lesser Antilles, relating to the bank accounts of a customer of the Bank.[1] The subpoena was served on the Bank's Miami, Florida agency on September 23, 1981. The Bank declined to produce the documents asserting that compliance with the subpoena without the customer's consent or an order of the Bahamian courts would violate Bahamian bank secrecy laws.[2]

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1 The Bank investigated and found no documents which were requested located at its Antigua branch. Accordingly, that part of the subpoena is not in issue.

2 Banks and Trust Companies Regulations Act of 1965, 1965 Bah. Acts No. 64, as amended by the Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bah. Acts No. 3, and Section 19 of the Banks Act, III Bah. Rev. Laws, c. 96 (1965), as amended by the Banks Amendment

A hearing was held on the government's motion to compel the Bank to comply with the subpoena on January 13, 1982. At the hearing conflicting evidence was presented as to the degree

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Act 1980, 1980 Bah. Acts No. ____. Both Section 10 and Section 19 are identical. Section 10 of the Bank and Trust Companies Regulation Act as amended provides:

Preservation of secrecy

10.—(1) No person who has acquired information in his capacity as—

(a) director, officer, employee or agent of any licensee or former licensee;

(b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act,

shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

—(2) Nothing contained in this section shall—

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

—(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against this Act and shall be liable on summary conviction to a fine not exceeding fifteen

of control the Miami agency held over documents held by the Nassau branch. The government presented evidence that all banking transactions for accounts in the Bahamian branch could be handled by the Miami agency. The Bank presented evidence that the Miami agency is a one-way conduit for customer communication with the Nassau branch. The Bank also presented an affidavit showing that compliance with the subpoena could expose the Bank to prosecution under the Bahamian bank secrecy law. The affidavit also showed that the government could obtain an order of judicial assistance from the Supreme Court of the Bahamas allowing disclosure if the subject of the grand jury investigation is a crime under Bahamian law and not solely criminal under United States tax laws. The government did not make a showing that the documents sought are relevant and necessary to the grand jury's investigation.[3]

After the district court entered an order compelling the Bank to comply with the subpoena, the Bank's Miami agent appeared before the grand jury and formally declined to produce the documents called for by the subpoena. The district court held the Bank in civil contempt and the Bank brings this appeal.

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thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

The government argues the Bank would not be successfully prosecuted by Bahamian authorities if it complied with the subpoena. In this regard it argues that because Section 10(2)(a) expressly preserves the common law relationship between bank and customers, the Bank is authorized to disclose the requested information. See *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (Banker may disclose banking information concerning a customer where the banker is compelled by law to disclose information); *Barclay's Bank International, Ltd. v. McKinney*, No. 474 (Bah. S.Ct. Feb. 16, 1979). Although the determination of foreign law is reviewable on appeal, F.R.Civ.P. 44.1, we shall assume for purposes of this appeal that the Bank will be subject to criminal sanctions in the Bahamas.

3 At a January 13, 1982 hearing the government submitted an *in camera* affidavit regarding the relevance of the documents sought. This document was not considered by the court below. We conclude it is unnecessary to view the document. See Part II, *infra*.

II. RELEVANCE OF THE DOCUMENTS

The Bank urges this court to follow the Third Circuit's holdings in *In re Grand Jury Proceedings*, 486 F.2d 85 (Schofield I) (3rd Cir. 1973), and *In re Grand Jury Proceedings*, 507 F.2d 963 (Schofield II) (3rd Cir. 1975), *cert. denied*, 421 U.S. 1015, 95 S.Ct. 2424, 44 L.Ed.2d 685 (1975), and require the government to show that the documents sought are relevant to an investigation properly within the grand jury's jurisdiction and not sought primarily for another purpose. The government does not dispute that the district court enforced the subpoena without making a finding that the documents sought were relevant or necessary for the grand jury's investigation. Rather, the government argues this case is controlled by *In re Grand Jury Proceedings. United States v. McLean*, 565 F.2d 318 (5th Cir. 1977), and *In re Grand Jury Proceedings. United States v. Guerrero*, 567 F.2d 281 (5th Cir. 1978),[4] where the Fifth Circuit declined to follow the *Schofield* rule absent some showing of harassment or prosecutorial misuse of the system. The bank argues that the *Schofield* rule, however, should be applied to cases such as this where foreign relations are implicated and where alternative methods are available to obtain the requested information that do not require the Bank to violate foreign law.

[1] The guidelines established by the Third Circuit in *Schofield* are not mandated by the Constitution; the Third Circuit imposed the requirements under that court's inherent supervisory power. *Schofield*, 486 F.2d at 89; *McLean*, 565 F.2d at 320. We decline to impose any undue restrictions upon the grand jury investigative process pursuant to this court's supervisory power.[5]

4 The Eleventh Circuit, in the en banc decision of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent the decisions of the Former Fifth Circuit decided prior to October 1, 1981.

5 Other circuits have declined to adopt such a rule. See, *e.g.*, *In re Pantojas*, 628 F.2d 701 (1st Cir. 1980); *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978). See also *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir. 1981) (reserving question of whether preliminary showing must be made in every case).

It is unnecessary to repeat here the vital role the grand jury plays in our system of jurisprudence. See, *In re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404, 407-09 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976). As stated by the court in *McLean*:

> Any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973).

In re Grand Jury Proceedings. United States v. McLean, 565 F.2d at 320.

[2] While it is true courts should not impinge upon the political prerogatives of the government in the sensitive area of foreign relations, *Chicago and Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948), accepting the Bank's position would be a greater interference with foreign relations than the procedures employed here. In essence, the Bank would require the government to choose between impeding the grand jury's investigation and petitioning the Supreme Court of the Bahamas for an order of disclosure.

This court is cognizant that international friction has been provoked by enforcement of subpoenas such as the one in question. See, Restatement (Revised) of Foreign Relations Law of the United States § 420, Reporter's Note 1. See generally, *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] A.C. 547, 616, 629-31, 639-40, 650 (H.L.) (criticizing the United States for claims of "jurisdiction over foreigners in respect to acts done outside the jurisdiction of that country"). But as recognized in *United States v. First National City Bank*, 379 U.S. 378, 384-85, 85 S.Ct. 528, 531-32, 13 L.Ed.2d 365 (1965), the various federal courts remain open to the legislative and executive branches of our government if matters such as this prove to have international repercussions. See, *e.g.*, Convention on Double Taxation of Income, September 27, 1951.

United States-Switzerland, 2 U.S.T. 1751, T.I.A.S. No. 2316 (Swiss-US Tax Treaty providing for exchange of information for, inter alia, the prevention of fraud).

III. DUE PROCESS

[3] The Bank contends that compliance with the subpoena would require it to violate the Bahamian bank secrecy law and therefore enforcing the subpoena and imposing contempt sanctions for noncompliance violates due process under *Societe Internationale Power Participations Industriells v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). The Bank argues that once it has shown Bahamian law bars production of the documents and that it is a disinterested custodian of the documents due process prohibits enforcement of the subpoena. We disagree.

The Bank attempts to fashion a due process defense to the contempt proceedings because of its lack of purposeful involvement or responsibility in the subject matter before the court. In essence, the Bank asserts it is fundamentally unfair to require a "mere stakeholder" to incur criminal liability in the Bahamas. The Bank's position does not withstand analysis.

In *Societe Internationale* a Swiss holding company brought an action to recover assets seized under the Trading with the Enemy Act. The district court had ordered production of certain banking records of a Swiss bank pursuant to the government's discovery request. The holding company failed to comply with the court's order, after good faith efforts were made to comply, on the grounds that compliance would violate Swiss penal laws. The district court then dismissed the suit with prejudice due to noncompliance with the production order. In reversing the district court, the Supreme Court did not erect an absolute bar to sanctions being imposed for noncompliance with summons or subpoenas whenever compliance is prohibited by foreign law. *Societe Internationale*, 357 U.S. at 105-06, 78 S.Ct. 1092-93; *United States v. Vetco, Inc.*, 644 F.2d 1324, 1329 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 671 (1981). *Societe Internationale* held only that the

sanction of outright dismissal of that plaintiff's complaint could not be imposed where that plaintiff had acted in good faith, was unable to comply because of foreign law, and was entitled to a hearing on the merits in order for the Trading with the Enemy Act to withstand constitutional challenge. *Societe Internationale*, 352 U.S. at 211-12, 78 S.Ct. at 1095-96. Compare, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 n. 14, 100 S.Ct. 2455, 2464 n. 14, 65 L.Ed.2d 488 n. 14, (1980) (emphasizing bad faith vs. inability to comply dichotomy). See *United States v. Vetco*, 644 F.2d at 1329-30. The Court left the district court free to impose other sanctions. *Societe Internationale*, 357 U.S. at 213, 78 S.Ct. at 1096. *Societe Internationale* does not stand for the proposition that a lawfully issued grand jury subpoena may be resisted on constitutional grounds where compliance would violate foreign criminal law. See, *e.g.*, *United States v. Vetco, Inc.*, 644 F.2d at 1329; *Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833, 99 S.Ct. 114, 58 L.Ed.2d 129 (1979); *SEC v. Banca Della Suizzera Italiance*, 92 F.R.D. 111 (S.D.N.Y. 1981).

The Bank has failed to bring itself within the holding of *Societe Internationale*. The district court found the Bank had not made a good faith effort to comply with the subpoena in its order of June 11, 1982. Record at 140. The Bahamian government has not acted to prevent the Bank from complying with the subpoena. Finally, the Bank is not being denied a constitutionally required forum to recover confiscated assets.[6]

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6 It is difficult to fashion due process protections recognizing the differential argued by the Bank, *i.e.*, stakeholder vs. participant. If fairness is the key, as is asserted here, then it seems hardly offensive to "traditional notions of fair play and substantial justice," *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940), to exempt entities who do business in the United States and thereby voluntarily bring themselves within the jurisdiction of our courts and legislatures from the burdens of United States law.

IV. COMITY

[4] The Bank's final contention is that comity between nations precludes enforcement of the subpoena. The Bank argues that the district court improperly analyzed this case under the balancing test of the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965) adopted in *In re Grand Jury Proceedings. United States v. Field*, 532 F.2d 404 (5th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309 (1976).[7] The district court concluded that because compliance with the subpoena may cause the Bank to violate Bahamian penal laws, it was appropriate to follow the balancing test adopted in *Field*. Because we conclude this case is controlled by *Field*, we affirm the court below.

In *Field* contempt penalties were upheld against a nonresident alien who, having been subpoenaed to testify before a grand jury while present in the United States, refused to answer questions before the grand jury, despite the witness' assertion that the very act of testifying would subject him to criminal penalties in his country of residence. *Id.* at 405. The grand jury was investigating the use of foreign banks in evading tax enforcement. Field was an officer of a bank located in the Grand Cayman Islands, British West Indies, and was subpoenaed to testify about matters concerning his bank

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7 Section 40 reads:

> Limitations on Exercise of Enforcement Jurisdiction
>
> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

and its clients. *Id.* at 405-06. After balancing the competing interests of the United States and the Cayman Islands under the Restatement approach, the court affirmed the district court's imposition of contempt sanctions against Field. *Id.* at 407-09.

The situation before us is similar to that in *Field* in all material respects. The Bank has been subpoenaed while subject to the jurisdiction of our courts and has been required to disclose information before a grand jury even though the very fact of disclosure may subject the Bank to criminal sanctions by a foreign sovereign.

The Bank attempts to distinguish *Field* from the case before us on four grounds. The Bank first asserts that the Bank itself is not under investigation by the grand jury, unlike the situation in *Field*. See *United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980) (Castle Bank and Trust Company of Nassau, Bahamas under investigation in 1972 as part of narcotics investigation known as "Operation Trade Winds"). A careful reading of *Field* reveals that the fact that Castle Bank and Trust Company was under investigation did not affect the court's analysis. That court was concerned with the proliferation of foreign secret bank accounts utilized by Americans to evade income taxes and conceal crimes. *In re Grand Jury Proceedings. United States v. Field*, 523 F.2d at 407-08. The instant subpoena calls for the production of certain records relating to bank accounts of a United States citizen pursuant to a tax and narcotics investigation.

Second, the Bank argues this case is distinguishable from *Field* because documentary evidence is requested here rather than testimonial evidence as in *Field*. The distinction, while real, is immaterial. The case before us concerns the relations among nations; whether the subpoena will be enforced is a matter of international comity. *Id.* at 407. Comity is "a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017, 92 S.Ct. 1294, 31

L.Ed.2d 479 (1972). Whether the requested information is testimonial or documentary, the effect on the competing state interests will be the same. The deference accorded the Bahamian interest is not to be diminished by the form of the requested information.

Third, the Bank argues this case is distinguishable from *Field* because the instant subpoena calls for information located in the Bahamas instead of the United States. This argument is without merit for two reasons. First, the disclosure to the grand jury will occur in this country. See *United States v. Vetco, Inc.*, 644 F.2d at 1332. Second, the affront to the Bahamas occurs no matter where the information is originally located; the interest of the Bahamas in preserving the secrecy of these records is impinged by the fact of disclosure itself.

Finally, the Bank contends the government "could avoid rather than provoke disrespect for the sovereignty of a friendly nation" by pursuing the alternative of applying for an order of judicial assistance permitting disclosure from the Supreme Court of the Bahamas. Brief of Appellant at 18. See *United States v. Vetco, Inc.*, 644 F.2d at 1332; *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968); Restatement (Revised) of Foreign Relations Law of the United States § 420 (Tent. Draft No. 3, 1982). Applying for judicial assistance, however, is not a substantially equivalent means for obtaining production because of the cost in time and money and the uncertain likelihood of success in obtaining the order. According to the affidavit from a member of the Honorable Society of Lincoln's Inn, England, and of the Bahamas Bar, the Supreme Court of the Bahamas does not have power to order disclosure if the subject of the investigation is criminal only under the tax laws of the United States. Therefore, it is not clear to any degree of certainty that the Bahamian court would order disclosure of all the requested documents.[8]

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8 The Bank conceded at oral argument that if the grand jury is conducting a tax investigation the documents could not be obtained through the judicial assistance procedure.

The judicial assistance procedure does not afford due deference to the United States' interests. In essence, the Bank asks the court to require our government to ask the courts of the Bahamas to be allowed to do something lawful under United States law. We conclude such a procedure to be contrary to the interests of our nation and outweigh the interests of the Bahamas.

In *Field* the vital role of a grand jury's investigative function to our system of jurisprudence and the crucial importance of the collection of revenue to the "financial integrity of the republic" outweighed the Cayman Islands' interest in protecting the right of privacy incorporated into its bank secrecy laws. *In re Grand Jury Proceedings. United States v. Field*, 532 F.2d at 407-08. The United States' interest in the case before us has not been diminished since *Field* was decided. The Bank asserts the Bahamas' interest in the right of privacy; this interest is similarly outweighed. A Bahamian court would be able to order production of these documents. Banks and Trust Companies Regulation Act, 1965 Bah. Acts No. 64, § 10(I)(iii), as amended 1980 Bah. Acts No. 3. In addition, numerous officials, employees, attorneys, and agents of the Bank of Nova Scotia or the Central Bank of the Bahamas may disclose information regarding the account in the performance of their various functions under the Bank Act. *Id.* § 10(1)(a-e). It is incongruous to suggest that a United States court afford greater protection to the customer's right of privacy than would a Bahamian court simply because this is a foreign tribunal. *In re Grand Jury Proceedings. United States v. Field*, 535 F.2d at 408. A statute that is "hardly a blanket guarantee of privacy" does not present a Bahamian interest sufficient to outweigh the United States' interest in collecting revenues and insuring an unimpeded and efficacious grand jury process. See *United States v. Payner*, 447 U.S. 727, 731, 100 S.Ct. 2439, 2444, 65 L.Ed.2d 468 n.4 (1980) (predecessor statute identical in relevant parts held not to create a reasonable expectation of privacy).

V. CONCLUSION

Absent direction from the Legislative and Executive branches of our federal government, we are not willing to emasculate the grand jury process whenever a foreign nation attempts to block our criminal justice process. It is unfortunate the Bank of Nova Scotia suffers from differing legal commands of separate sovereigns, but as we stated in *Field*:

> In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation [the Bank] finds [it]self. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.

In re Grand Jury Proceedings. United States v. Field, 535 F.2d at 410.

For the reasons stated above, the judgment entered by the district court is

AFFIRMED.

APPENDIX B

OPINION OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA

—vs.—

BANK OF NOVA SCOTIA

CASE NO. GRAND JURY 81-FL-1

JUNE 11, 1982

On September 23, 1981 a Federal Grand Jury Subpoena duces tecum was served on the Florida agency of the Bank of Nova Scotia, a branch of that bank which operates in Miami, Florida. The subpoena called for the production of certain records maintained at the main branch or any of the branch offices of the Bank of Nova Scotia in Nassau, Bahamas, in Antigua, Lesser Antilles, relating to bank accounts of Robert Twist, Sr., Lesser Antilles Trading Company, Ltd. and/or Latco Development Corporation d/c/b/a Ambassador Jet. The basic position of the bank is that compliance with the subpoena will subject the bank to criminal liability in the Bahamas. Papers filed by the bank state that there are no records which were requested that are being held by its Antigua branch. Thus this order will only be concerned with Bahamian records.

Section 10 of the Banks and Trust Companies Regulation Act of 1965, 1965 Bahamian Acts No. 64, as amended by the Banks and Trust Companies Regulation (Amendment) Act 1980 provides in pertinent part:

(1) No person who has acquired information in his capacity as

(a) director, officer, employee or agent of any licensee or former licensee. . . shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this act, as the case may be, except

(i) for the purpose of the performance of his duties or the exercise of his functions under this act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within the Bahamas, or under the provisions of any law of the Bahamas.

(2) Nothing contained in this section shall

(a) prejudice or derogate from the rights and duties subsisting in common law between the licensee and his customers; or

(b) prevent the licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offense against this act and shall be liable on summary conviction to a fine not exceeding $15,000 or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

Inasmuch as compliance with the subpoena may cause the Bank of Nova Scotia to be subject to criminal charges, this

Court finds it appropriate to follow the balancing test set forth in Sections 39 and 40 of the *Restatement (Second) of the Foreign Relations Law of the United States. United States v. Field*, 532 F.2d 404 (5th Cir. 1976). Under this test there are five factors for consideration. These are:

(a) The vital interests of each of the states

(b) The extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person

(c) The extent to which the required conduct is to take place in the territory of the other state

(d) The nationality of the person

(e) The extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

The Court finds in weighing the various factors that this subpoena should be enforced.

As to the first factor, it seems apparent that the interest of the United States in enforcing the subpoena in order to further the investigatory function of the grand jury is greater than the Bahamian interest in secrecy. The Bahamian Secrecy Statute does not provide a total prohibition of disclosure for there are a number of exceptions including disclosure ordered by a Bahamian court. It would be anomalous to give the target of this investigation, an American citizen, greater protection of his Bahamian banking records than he could expect in his United States bank accounts. *United States v. Payner*, 447 U.S. 727, 732 n.4 (1980). Since under the Bahamian Act a court of the Bahamas could order disclosure in connection with an investigation conducted in the Bahamas, the bank's customer's right of privacy should not receive greater protection merely because a foreign tribunal is conducting the investigation.

As to the second factor, inconsistent enforcement action may impose some hardship on the bank. However, the bank has not

made a good faith effort to either obtain the consent of the customer, apply to the court of the Bahamas for an order requiring disclosure or to seek a waiver from the Bahamian government. At this time the Court cannot find with certainty whether the hardship would be actual or merely theoretical but it does appear that the bank has failed to make a good faith effort to comply with the subpoena. *United States v. Vetco*, 644 F.2d 1324 (9th Cir. 1981).

The third and fourth factors are the extent to which the required conduct is to take place in the territory of the other state and the nationality of the person. While the records must be gathered in the Bahamian branch and sent to the Florida branch of the Bank of Nova Scotia, the actual disclosure will be made in the United States rather than in the Bahamas. The Court does not find the Government's argument with regard to the nationality of the bank convincing. Neither does it find it to be a significant factor in the circumstances of this case.

As to the last factor, enforcement of the subpoena will help to insure compliance with the Grand Jury's goals of investigating criminal matters. While enforcement in some respects ameliorates the privacy interests which the Bahamian statute attempts to protect, the stated exceptions to the non-disclosure provisions of the statute indicate that enforcement is not an unreasonable diversion from these concerns.

It is

ORDERED and ADJUDGED that the subpoena issued to the Miami branch office of the Bank of Nova Scotia shall be enforced.

DONE and ORDERED in Chambers this 11th day of June, 1982.

James C. Paine /s/

UNITED STATES DISTRICT JUDGE

cc: Richard D. Humphrey
Veda Carney, Esq.
Thomas R. Julin

ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,

Plaintiff,

—VS.—

THE BANK OF NOVA SCOTIA,

Defendant.

CASE NO 81-1

July 6, 1982

ORDER GRANTING MOTION TO HOLD THE BANK OF NOVA SCOTIA IN CONTEMPT

This cause came before the Court on the Government's motion to hold The Bank of Nova Scotia in contempt for refusing to comply with the June 11, 1982 order of this Court enforcing a federal grand jury subpoena. The Court having considered the evidence submitted at the hearing on this motion as well as the memorandum of law and oral arguments of counsel for the parties, it is

ADJUDGED that THE BANK OF NOVA SCOTIA is in contempt of this Court because of its failure to produce records subpoenaed from its Bahamian branch before the federal grand jury in Fort Lauderdale, Florida. It is further,

ORDERED that The Bank be brought before the Court on five days notice following completion of all proceedings seeking review of this Court's action in this case and at that time

the Court will impose a civil penalty on The Bank until compliance with the subpoena and the order of this Court.

DONE and ORDERED in Chambers at Dade County, Florida, this 6th day of July, 1982.

James C. Paine /s/
UNITED STATES DISTRICT JUDGE

cc: Richard Humphrey, Esq.
Veta M. Carney, Esq.
Talbot D'Alemberte, Esq.

OPINION OF THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA

—v.—

BANK OF NOVA SCOTIA

CASE NO. GRAND JURY 81-FL-1

JULY 10, 1982

It has come to the attention of the court that its order of July 6, 1982, is defective in that it is not a final, appealable order. Although the court is not willing to grant the government's motion to amend order in full and jail the local agent of the Bank of Nova Scotia merely to expedite an appeal, the court is desirous that its order be final so that it may be appealed as soon as possible. The contempt involved is that of the Bank of Nova Scotia as an entity, not that of its local agent.

This court finds as a matter of fact that:

1. This court enforced a grand jury subpoena duces tecum.

2. The bank as a corporate body decided through its officers and agents to make the documents requested unavailable to the person it designated as custodian of records.

3. The bank's Miami agent appeared before the grand jury on June 30, 1982, and declined on behalf of the bank to produce the documents.

This court finds as a matter of law that the Bank of Nova Scotia has resisted its lawful process and order by refusing to comply with the June 11, 1982, order enforcing a federal grand jury subpoena.

In accord with 18 U.S.C. § 401, this court finds the Bank of Nova Scotia in civil contempt and imposes a sentence of $500.00 per day, beginning three days from the date this order is signed and continuing until the day prior to the date on which the Bank of Nova Scotia complies with the order of June 11, 1982, or continuing until the date this grand jury expires, whichever may be sooner.

DONE and ORDERED this 10th day of July, 1982, at West Palm Beach, Florida.

James C. Paine /s/

JAMES C. PAINE
UNITED STATES DISTRICT JUDGE

cc: Richard Humphrey
Veta M. Carney
Talbot D'Alemberte

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5831

January 25, 1983

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—versus—

THE BANK OF NOVA SCOTIA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and CLARK, *Circuit Judges*, and MORGAN, *Senior Circuit Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

November 29, 1982

ISSUED AS MANDATE: JANUARY 25, 1983

APPENDIX D

TO ALL PARTIES BELOW:

No. 82-5831
IN RE: GRAND JURY PROCEEDINGS
U.S.A. vs. BANK
District Court No. MISC 81-00001

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

☐ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure: Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

☒ No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Very truly yours,

NORMAN E. ZOLLER, Clerk

By: Kemura L. Smith /s/
Deputy Clerk

CC: Mr. James A. Pardo
Mr. Glenn L. Archer, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5831

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—versus—

THE BANK OF NOVA SCOTIA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion November 29, 1982, 11 Cir., 198__, _____ F.2d _____).

(January 6, 1983)

Before FAY and CLARK, *Circuit Judges* and MORGAN, *Senior Circuit Judge*.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Peter Fay /s/

United States Circuit Judge

APPENDIX E

U. S. CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

18 U.S.C. § 401

§ 401. *Power of court*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX G

BAHAMIAN ACT
No. 3 of 1980

An Act to amend the Banks and Trust Companies Regulation Act, 1965.

(Assented to: 24th March, 1980)
(Commencement: 24th March, 1980)

Enacted by the Parliament of The Bahamas.

1. This Act may be cited as the Banks and Trust Companies Regulation (Amendment) Act, 1980.

2. Section 10 of the Banks and Trust Companies Regulation Act, 1965 is repealed and the following section substituted—

10. —(1) No person who has acquired information in his capacity as—

(a) director, officer, employee or agent of any licensee or former licensee;

(b) counsel and attorney, consultant or auditor of the Central Bank of The Bahamas, established under section 3 of the Central Bank of The Bahamas Act, 1974, or as an employee or agent of such counsel and attorney, consultant or auditor;

(c) counsel and attorney, consultant, auditor, accountant, receiver or liquidator of any licensee or former licensee or as an employee or agent of such counsel and attorney, consultant, auditor, accountant, receiver or liquidator;

(d) auditor of any customer of any licensee or former licensee or as an employee or agent of such auditor;

(e) the Inspector under the provisions of this Act, shall, without the express or implied consent of the customer concerned, disclose to any person any such information relating to the identity, assets, liabilities, transactions, accounts of a customer of a licensee or relating to any application by any person under the provisions of this Act, as the case may be, except—

(i) for the purpose of the performance of his duties or the exercise of his functions under this Act, if any; or

(ii) for the purpose of the performance of his duties within the scope of his employment; or

(iii) when a licensee is lawfully required to make disclosure by any court of competent jurisdiction within The Bahamas, or under the provisions of any law of The Bahamas.

(2) Nothing contained in this section shall—

(a) prejudice or derogate from the rights and duties subsisting at common law between a licensee and its customer; or

(b) prevent a licensee from providing upon a legitimate business request in the normal course of business a general credit rating with respect to a customer.

(3) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding fifteen thousand dollars or to a term of imprisonment not exceeding two years or to both such fine and imprisonment.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

81-1 (Ft. L.)

In Re: Grand Jury Proceedings

UNITED STATES

—Against—

BANK OF NOVA SCOTIA

COMMONWEALTH OF THE BAHAMAS
New Providence

Affidavit

PETER D. GRAHAM, being sworn says:

1. I am a partner in the firm of Graham, Thompson and Co. of Nassau, Bahamas and I make this Affidavit in opposition to the motion by the United States Department of Justice (the "Department") for an order compelling the Bank of Nova Scotia (the "Bank") to comply with a Grand Jury subpoena served on September 23, 1981. The subpoena requires production of customer records maintained at the Bank's branch in Nassau, Bahamas. As explained below, the Branch's officers will be subject to criminal prosecution in the Bahamas should the Branch produce records required by the subpoena. However, the Department—and not the Bank—can avoid such liability to the Bank by application to the Bahamian court for an order directing production of the records.

BACKGROUND

2. I obtained my Law Degree (LL.B.) from the University of London, England and was called to the Bar of England and Wales in 1949. I am a member of The Honorable Society of Lincoln's Inn, England and a member of The Bahamas Bar. I was a member of the Bahamas Parliament from 1956 through 1972 and served as Minister of Housing and Labor in the Bahamas Government from 1964 through 1967. I am fully qualified to practice, and have practiced in all the courts of law of the Commonwealth of The Bahamas.

3. For purposes of this Affidavit, I have reviewed (1) The Grand Jury Subpoena served September 23, 1981 and (2) the papers submitted in support of the motion by the Department to compel compliance with the subpoena.

THE ACT

4. The Bank's Nassau branch is licensed to do business in the Bahamas by the Government of the Commonwealth of The Bahamas and is subject to the Banks and Trust Companies Regulation Act of 1965 as amended (the "Act"), a copy of which is attached as Exhibit A. Section 10(1) of the Act prohibits disclosure of customer records by an officer of the Branch without consent of the customer, save for three limited exceptions:

> (I) For the purpose of the performance of his duties or the exercise of his functions under this Act, if any, or
>
> (II) For the purpose of the performance of his duties within the scope of his employment, or
>
> (III) When a licensee is lawfully required to make disclosure by any court of competent jurisdiction within the Bahamas, or under the provisions of any law of the Bahamas.

Section 10(3) of the Act provides that contravention of Section 10(1) is a criminal offense punishable by up to two years imprisonment or a fine of up to $15,000.00 or to both such

fine and imprisonment. The Act articulates a fundamental policy of the Bahamas, and the 1980 amendment emphasizes the importance of that policy.

5. Production of records required by the subpoena will expose the Branch's officers to prosecution under the Act unless one of the three narrow exceptions of Section 10(2) are met. However, from my review of the papers submitted in support of the Department's motion, no exception appears to be met.

6. Although the Department claims that the Bank may apply to a Bahamian court for an order permitting it to comply with the subpoena, I am aware of no statutory or common law basis for such an application. Such an application would defeat the purpose of the Act.

7. On the other hand, the Department may apply for such an order of judicial assistance permitting disclosure. Pursuant to Section 10(1)(E)(111) of the Act, the Department may apply to the Supreme Court of The Bahamas for an order permitting disclosure of the documents requested. While the Bahamas subscribes to the Anglo-American doctrine that one country will not enforce the fiscal laws of another, the Supreme Court of The Bahamas has the power to order such disclosure where the criminal activity which is the subject of investigation by the Department is both criminal under Bahamian law, and is not criminal merely under the tax laws of the United States.

8. It appears from the papers submitted in support of the Department's motion that the Department's investigation is, in part, related to possible criminal violation of the narcotics laws of the United States, and if that is correct, it would appear that the Department may have grounds for application to the Bahamian Supreme Court for an order permitting the disclosure of bank records relevant to such criminal activity.

9. On the basis of my experience as a member of the Bahamas Parliament and a Minister of the Bahamas Govern-

ment, I would regard it as a serious affront to and invasion of the sovereignty of the Bahamas if, granted the availability of judicial assistance in the Bahamas, a foreign court were nevertheless to order a Bahamian resident to violate the laws of the Bahamas to suit the convenience of foreign government officials.

SWORN to before me the
12th day of January, 1982

Peter D. Graham /s/

Notary Public
of
the Commonwealth of the Bahamas

APPENDIX I

Rule 28.1. Listing of Parents, Subsidiaries and Affiliates.

BNS International (Hong Kong) Limited
BNS International (Ireland) Limited
The Bank of N.T. Butterfield & Son Limited
The Bank of Nova Scotia Asia Limited
The Bank of Nova Scotia Channel Islands Limited
The Bank of Nova Scotia Trust Company Channel Islands Limited
The Bank of Nova Scotia International Limited
The Bank of Nova Scotia International (Curacao) N.V.
Bank of Nova Scotia Properties Inc.
Bernard Sunley Building Limited
BNS International (Panama) S.A.
BNS International (United Kingdom) Limited
The Bank of Nova Scotia Jamaica Limited
The Bank of Nova Scotia Trust Company Jamaica Limited
The Bank of Nova Scotia N.V.
The Bank of Nova Scotia Trinidad & Tobago Limited
The Bank of Nova Scotia Trust Company of the West Indies Limited
The Bank of Nova Scotia Trust Company (Bahamas) Limited
The Bank of Nova Scotia Trust Company (Caribbean) Limited
The Bank of Nova Scotia Trust Company (Cayman) Limited
The Bank of Nova Scotia Trust Company of New York
The Bank of Nova Scotia Trust Company (United Kingdom) Limited
Brunswick Square Limited
Chargex Limited
Empire Realty (Cayman) Limited
Export Finance Corporation of Canada Limited
Maduro & Curiel's Bank N.V.
MHA Property Ltd.
MHB Property Ltd.
MHE Property Ltd.

MHF Property Ltd.
MHG Property Ltd.
MHH Property Ltd.
MHI Property Ltd.
MHJ Property Ltd.
MHK Property Ltd.
MHM Property Ltd.
The Nova Scotia Corporation
Schroder, Darling and Company Holdings Limited
Schroder, Darling and Company Limited
Scotia Centre Limited
Scotia Factors Limited
Scotia Leasing Limited
Scotia Mortgage Corporation
Scotia Realty Limited
Scotia-Toronto Dominion Leasing Limited
Scotia Ventures Limited
Scotiabank de Puerto Rico
Scotiafund Financial Services Ltd.
Singapore Gold Clearing House Private Limited
Vancouver Center Development Limited
The West India Company of Merchant Bankers Limited
Windsor Developments Limited

Office-Supreme Court, U.S.
FILED
MAY 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1531

In the Supreme Court of the United States

OCTOBER TERM, 1982

BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
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QUESTION PRESENTED

Whether the lower courts' enforcement of a grand jury subpoena issued to petitioner was proper despite petitioner's claim that compliance with the subpoena would subject it to criminal prosecution for violation of the bank secrecy law of the Commonwealth of the Bahamas.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 691 F.2d 1384. The opinions and order of the district court (Pet. App. 1b-8b) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1982 (Pet. App. 1c). A petition for rehearing was denied on January 6, 1983 (Pet. App. 1d-3d). The petition for a writ of certiorari was filed on March 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges an order of the United States District Court for the Southern District of Florida holding it in civil contempt for failing to comply with a prior order of the

court enforcing a federal grand jury subpoena. The Commonwealth of the Bahamas has filed a brief as *amicus curiae* in support of the petition.

On September 23, 1981, a federal grand jury conducting a tax and narcotics investigation in the Southern District of Florida issued a subpoena duces tecum to petitioner for the production of certain records maintained at petitioner's main branch or any of its branch offices in Nassau, Bahamas, and Antigua, Lesser Antilles,[1] relating to bank accounts of Robert Twist, Sr., Lesser Antilles Trading Company, Ltd., and/or Latco Development Corporation d/b/a Ambassador Jet International, Inc., for the period January 1, 1975 through and including September 30, 1981 (Pet. App. 2a; 1b; R. 3-4, 23-24; Jan. 1982 Tr. 4).[2] The subpoena was served on petitioner at its Miami, Florida, office (Pet. App. 2a).[3] Asserting that compliance with the subpoena would violate the bank secrecy law of the Commonwealth of the Bahamas, petitioner refused to produce the subpoenaed documents (*ibid.*).

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[1]Petitioner advised the district court that there are no documents responsive to the subpoena at the Antigua branch (Pet. 3 n.1; Pet. App. 2a n.1), and thus that aspect of the subpoena is not at issue.

[2]"R." refers to the original record on appeal. "Jan. 1982 Tr." refers to the reporter's transcript of proceedings on January 13, 1982, and "July 1982 Tr." refers to the reporter's transcript of proceedings on July 6, 1982. The transcripts are contained in volume two of the record on appeal. "Bah. Br." refers to the brief as *amicus curiae* filed in support of the petition by the Commonwealth of the Bahamas.

[3]Petitioner is chartered in Canada and has branches in numerous countries, including the United States and the Bahamas (Pet. 2-3). Petitioner's Bahamian branch and its Miami, Florida, office are both parts of a single corporate entity (July 1982 Tr. 25).

Kim David Taylor, who is in charge of the Miami office (July 1982 Tr. 13), testified at a contempt hearing on July 6, 1982, that his office had on occasion opened accounts in the Bahamas for customers and that customers could make deposits to Bahamian accounts at his office

On June 11, 1982, the district court granted the government's motion to compel petitioner to comply with the subpoena (Pet. App. 1b-4b). In its order, the district court found (*id.* at 2b) that "compliance with the subpoena may cause the Bank of Nova Scotia to be subject to criminal charges" and therefore applied the balancing test adopted by the Fifth Circuit for such situations in *In re Grand Jury Proceedings (Field),* 532 F.2d 404 (1976), cert. denied, 429 U.S. 940 (1976).[4] In considering the factors set forth in Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States (1965) (hereinafter "Restatement"), the court concluded: (1) that the interest of the United States in furthering the investigatory function of the grand jury outweighed the Bahamian interest in secrecy (Pet. App. 3b); (2) that while there was a potential for hardship to the bank, the court could not find with certainty whether the hardship would be actual or merely theoretical and that petitioner had not made a good faith effort to comply with the subpoena by seeking the consent of its customer, a Bahamian court order, or a waiver from the Bahamian government (*id.* at 3b-4b); (3) that it was significant that actual disclosure pursuant to the subpoena would occur in the United States, not the Bahamas (*id.* at 4b); and (4) that enforcement of the subpoena would help to

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(July 1982 Tr. 20). He claimed, however, that customers had to communicate directly with the Bahamian branch to make withdrawals or obtain information as to the status of their accounts (July 1982 Tr. 20-21). This claim conflicted with information obtained from petitioner by Internal Revenue Service (IRS) Special Agent Albert J. Monica. On January 12, 1982, he spoke by telephone with a Bill Armstrong at petitioner's main office in Toronto, Canada, and was told that all banking transactions for accounts in the Bahamas could be handled by the Miami office (R. 120).

[4]Decisions of the Fifth Circuit handed down prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner* v. *City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (en banc).

insure compliance with the grand jury's goals of investigating criminal matters (*ibid.*).

Petitioner refused to comply with the enforcement order, and on July 10, 1982, the district court issued an order holding petitioner in contempt and imposing a penalty of $500 per day (Pet. App. 7b-8b). Petitioner appealed, and the court of appeals affirmed (Pet. App. 1a-13a). The court of appeals rejected petitioner's contentions that the government was required to make a showing as to the relevance of the documents sought (Pet. App. 5a-6a), that enforcement of the subpoena would impinge upon the political prerogatives of the government in the area of foreign relations (*id.* at 6a-7a), that imposing sanctions upon petitioner violated due process because petitioner was a "mere stakeholder" (*id.* at 7a-8a), and that the district court improperly analyzed this case under the Restatement's balancing test (*id.* at 9a-12a). The court of appeals also determined that requiring the government to apply to the Bahamian courts for judicial assistance would not be substantially equivalent to use of a grand jury subpoena (*id.* at 11a-12a). The court pointed out that an affidavit of Peter D. Graham (*id.* at 1h-4h), a member of the Bahamas Bar, stated that the Supreme Court of the Bahamas would not order disclosure of bank records if the subject of an investigation is a crime only under the tax laws of the United States. The court also noted (*id.* at 11a n.8) that petitioner conceded at oral argument that the documents could not be obtained through the judicial assistance procedure if the grand jury is conducting a tax investigation. Thus, the court concluded (*id.* at 11a; footnote omitted), "it is not clear to any degree of certainty that the Bahamian court would order disclosure of all the requested documents."

ARGUMENT

Petitioner contends (Pet. 4) that the decision below conflicts with principles enunciated by this Court and other

courts of appeals. As we demonstrate below, there is no conflict with any decision of this Court, and the courts of appeals are in basic agreement on the appropriate analytic framework to employ in cases of this sort. To the extent a conflict exists at all, it involves only a relatively minor procedural issue that does not require this Court's resolution. Review in this case, where the grand jury has been denied petitioner's evidence since September 1981 and is faced with the imminent running of the statute of limitations as to some aspects of its investigation, would be especially inappropriate.

1. Petitioner contends (Pet. 6-8) that the decision of the court of appeals conflicts with this Court's decisions applying the act of state doctrine (see, *e.g., Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964))[5] and its decisions

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[5]The Bahamas argues (Bah. Br. 4) that the decision of the court of appeals defies the principles that " 'the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute,' " quoting *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch.) 116, 136 (1812), and that a country cannot extend its enforcement jurisdiction beyond its own territory into another sovereign nation. These principles are inapplicable to this case. The subpoena in issue was served on an office of the petitioner in this country and sought records related to a citizen of this country, and production pursuant to the subpoena would take place in this country. Thus, the government of the United States did not attempt to exercise jurisdiction outside its own territory.

The Bahamas also argues (Bah. Br. 5-9) that the decision below may have an adverse affect on diplomatic relations between the United States and other countries. But, as the Bahamas acknowledges (Bah. Br. 9), this Court has recognized that the judiciary has " 'neither the aptitude, facilities, nor responsibility,' " quoting *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948), to conduct foreign affairs and that these matters rest with the Executive Branch. Where, as here, the Executive Branch has expressed no concern and is itself seeking to enforce the subpoena, judicial resolution cannot turn on notions of foreign policy. See *United States* v. *First National City Bank*, 379 U.S. 378, 384-385 (1965).

in *Societe Internationale Pour Participations Industrielles* v. *Rogers*, 357 U.S. 197 (1958), and *United States* v. *First National City Bank*, 379 U.S. 378 (1965). Petitioner's contentions lack merit.

a. Petitioner did not claim below that the act of state doctrine precluded enforcement of the instant subpoena, thus depriving the district court and the court of appeals of the opportunity to consider any application the doctrine might have in this case. Absent exceptional circumstances not present here, this Court will not review arguments not presented to the lower courts. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the doctrine was plainly inapplicable because the courts below did not sit in judgment on any acts of the government of the Bahamas done within its own territory. See *Sabbatino*, *supra*, 376 U.S. at 416.[6]

b. Nor does enforcement of the subpoena pose any conflict with *Societe Internationale* or *First National City Bank*. In *Societe Internationale*, a Swiss holding company was seeking to recover assets that had been seized by the Alien Property Custodian under the Trading with the Enemy Act. This Court held that the district court had properly ordered production of Swiss records pursuant to the government's discovery request, despite the plaintiff/-Swiss-holding-company's claim that Swiss law limited its

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[6]Petitioner also argues (Pet. 6) that enforcement of the instant subpoena offends the principle that a court of the United States will not enforce acts of a foreign government that take effect in this country, if those acts are inconsistent with the laws or public policy of this country. But it is refusal to enforce the subpoena that would offend this principle, for such refusal would, in effect, enforce the Bahamian law in this country at the expense of the grand jury's ability to carry out its functions. Given the importance of the grand jury's role (see, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 342-345 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 701-702 (1972)), such a result would be clearly contrary to the public policy of the United States.

ability to satisfy the production order because those producing the records would have been exposed to possible criminal sanctions under Swiss law (357 U.S. at 204-206). Petitioner relies (Pet. 7) on the Court's further holding that dismissal of the holding company's complaint was not an appropriate sanction for failure to comply with the discovery request in light of the fact that the holding company had unquestionably made good faith efforts to comply with the production order and because the holding company had certain constitutionally protected rights to maintain the suit (357 U.S. at 208-213). But the Court made it clear that the district court had discretion to impose lesser sanctions (357 U.S. at 213).[7] Accordingly, as recognized in *United States* v. *Vetco, Inc.*, 644 F.2d 1324, 1329 (9th Cir.), cert. denied, 454 U.S. 1098 (1981), *Societe Internationale* "did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign laws."

In the instant case, unlike *Societe Internationale,* there has been no alleged taking of petitioner's property. Nor has petitioner demonstrated a genuine risk that compliance with the subpoena would subject it to criminal sanctions. As the court of appeals stated (Pet. App. 8a), the Bahamian government has not acted to prevent petitioner from complying with the subpoena. Compare *Societe Internationale, supra,* 357 U.S. at 200-201.[8] Moreover, the district court

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[7]For example, the Court recognized that in the absence of complete disclosure, the district court might be justified in drawing inferences adverse to the holding company as to particular events (357 U.S. at 213).

[8]The court of appeals, for purposes of its opinion, assumed that Bahamian law prohibited disclosure of the subpoenaed records (Pet. App. 4a n.2). We note, however, that Section 10(2)(a) of the Bahamian bank secrecy law (Pet. App. 2g) expressly preserves the common law relationship between a bank and its customers. Thus, petitioner is authorized to comply with the subpoena because, at common law, a

expressly found (Pet. App. 4b) that petitioner has *not* made a good faith effort to comply with the subpoena. As of the date of the order enforcing the subpoena, petitioner had made no showing that it had attempted to obtain its customer's consent to disclosure,[9] the record discloses no efforts by petitioner to consult the Bahamian government regarding disclosure (compare *Societe Internationale, supra,* 357 U.S. at 200-203), and petitioner has never applied for an order of a Bahamian court authorizing disclosure.[10] Thus, petitioner's situation is significantly different from that of the plaintiff in *Societe Internationale.*[11]

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banker may disclose banking information where the banker is compelled by law to do so, where there is a duty to the public to disclose, where the interests of the bank require disclosure, or where the customer expressly or impliedly consents. *Tournier* v. *National Provincial & Union Bank of England,* [1924] 1 K.B. 461, 473. Here, the first three grounds for disclosure apply. A court of competent jurisdiction has ordered disclosure. The bank has a public duty to disclose under the principle that the public has a right to every man's evidence. *United States* v. *Calandra,* 414 U.S. 338, 345 (1974). And the bank has an obvious interest in avoiding contempt penalties.

[9]At the contempt hearing, however, it represented that the customer's consent had been sought and denied (July 1982 Tr. 19).

[10]Petitioner insists (Pet. 3) that it has no standing under Bahamian law to apply for such an order, but the provision of the bank secrecy law under which petitioner claims the government may apply for an order (Section 10(1)(e)(iii), reprinted at Pet. App. 2g), says nothing as to who may make an application. The Graham affidavit (Pet. App. 3h), on which petitioner bases its claim, cites no authority for the assertion that there is no procedure for an application by petitioner for an order. Thus, the record discloses no reason why petitioner could not apply for an order authorizing its compliance with the subpoena.

[11]The Commonwealth of the Bahamas asserts (Bah. Br. 11) that, following *Societe Internationale,* the appellate courts have consistently held that before considering the imposition of sanctions or other steps to force violation of foreign law the lower courts should direct parties before them to make all good faith efforts to comply with production requests. The cases cited by the Bahamas, *CAB* v. *Deutsche Lufthansa Aktiengesellschaft,* 591 F.2d 951, 953 (D.C. Cir. 1979), and *SEC* v. *Minas de Artemisa,* 150 F.2d 215, 218 (9th Cir. 1945), impose no such requirement on the lower courts.

Nor does *First National City Bank, supra,* support petitioner's position. There, the Court upheld a district court order freezing a foreign corporation's bank account in a foreign branch of a domestic bank. In its opinion, the Court noted (379 U.S. at 384) that the mere freezing of the account would not violate foreign law. The Court did not state, however, that a violation of foreign law would have required a different result.[12]

2. Petitioner and the Bahamas also contend (Pet. 8-12; Bah. Br. 5, 10) that the decision below conflicts with the decisions of other circuits in two respects. As discussed below, one of the asserted conflicts turns on factual distinctions that do not warrant this Court's review, while the other has no practical significance for this case and its resolution in this case would seriously delay the grand jury's investigation.

a. Petitioner and the Bahamas contend (Pet. 9, 11-12; Bah. Br. 5) that the decision below is in conflict with decisions of other circuits on the enforceability of a subpoena requiring production of information in violation of foreign law. In fact, however, the courts of appeals are all in agreement that this issue should be decided by application of the Restatement's five-factor balancing test. See, *e.g.*, Pet. App. 9a; *United States* v. *First National Bank,* 699 F.2d 341, 345

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[12]In any event, there would be lesser concerns as to foreign law in the instant case than in that case. There, the order required an act that might be contrary to the foreign country's law to be committed in a foreign jurisdiction, while the order here requires disclosure in this country. The language of the Bahamian statute indicates that bank employees in the Bahamas could transfer records to this country without violating the statute. Section 10(1)(e)(ii) (Pet. App. 2g) permits a bank employee to make a disclosure "for the purpose of the performance of his duties within the scope of his employment." This language suggests that petitioner's employees in the Bahamas would not violate the law if they sent records out of that country in accordance with orders from their superiors in Canada.

(7th Cir. 1983); *United States* v. *Vetco, Inc., supra,* 644 F.2d at 1330; *In re Westinghouse Electric Corp. Uranium Litigation,* 563 F.2d 992, 997 (10th Cir. 1977); *In re Grand Jury Proceedings (Field), supra,* 532 F.2d at 407; *United States* v. *First National City Bank,* 396 F.2d 897, 902 (2d Cir. 1968).

Nevertheless, petitioner contends that the decision below conflicts with that of the Seventh Circuit in *United States* v. *First National Bank, supra.*[13] In that case, arising out of an IRS summons enforcement proceeding seeking information pertaining to the IRS's collection efforts, the court expressly recognized that a foreign bank secrecy law did not automatically bar a domestic court from compelling production of bank records (699 F.2d at 345). It held, however, that under the balancing test of Section 40 of the Restatement, the summons in that case ought not to be enforced (*ibid.*). The court was aware of the decision in the instant case, but it found the two cases to be factually distinguishable on a number of grounds: the court of appeals here had the benefit of findings of fact by the district court, including a finding that petitioner had not made a good faith effort to comply with the subpoena; the information here was sought by a grand jury rather than by the civil tax collector; there

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[13]The Bahamas further contends (Bah. Br. 4-5) that the decision below also conflicts with decisons of the Second and Tenth Circuits in *Application of Chase Manhattan Bank,* 297 F.2d 611 (2d Cir. 1962); *Ings* v. *Ferguson,* 282 F.2d 149 (2d Cir. 1960); and *In re Westinghouse Electric Corp. Uranium Contracts Litigation, supra.* No conflict exists. The Second Circuit has subsequently receded from its position in *Chase Manhattan Bank* and *Ings* that principles of international comity preclude enforcement of a subpoena that might require the subpoenaed party to violate foreign law. See *United States* v. *First National City Bank, supra,* 396 F.2d at 901-905. In *Westinghouse,* the Tenth Circuit did not hold that foreign law was an absolute bar to the imposition of sanctions. It held only that a balancing of the Restatement's various factors in that case indicated that a contempt order and sanctions were inappropriate (563 F.2d at 999). Moreover, *Westinghouse* involved private litigation rather than grand jury proceedings.

was evidence here, though contested, that all banking transactions for petitioner's Bahamian branch could be handled by the Miami office; Bahamian law here permitted disclosure with the customer's consent, while the Greek law at issue in *First National Bank* did not; and the power of a Bahamian court to permit disclosure did not appear to be as strictly limited as that of a Greek court (699 F.2d at 346-347). Although the government does not agree that all of the factual distinctions advanced by the Seventh Circuit justify the result it reached,[14] it is readily apparent that the two decisions present no legal conflict requiring this Court's resolution.

Petitioner nevertheless relies on the Seventh Circuit's decision for its argument (Pet. 9,11) that a witness must be found to have some purposeful involvement in the subject of an investigation before production of information in violation of foreign law will be ordered. This contention is plainly untenable. First, the Seventh Circuit stated only that the bank's status as a "neutral" party was "significant," not controlling (699 F.2d at 346).[15] Moreover, third party

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[14]For example, there is no meaningful distinction between the national interest in grand jury investigations and IRS investigations. As this Court recognized in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), the investigative function of the IRS is essentially the same as that of the grand jury. And, of course, the collection of taxes is essential to the financial integrity of this country. *Field, supra*, 532 F.2d at 408.

[15]At any rate, it is hardly clear that petitioner is a completely neutral party. It would be naive indeed to assume that petitioner is not aware that at least some of its American customers may use its Bahamian branch because they desire the protection of the bank secrecy laws. Petitioner's Miami office actively assists customers in the opening of accounts in the Bahamas and transfers customers' funds to Bahamian accounts (July 1982 Tr. 20). It is obviously in petitioner's commercial interest to resist compliance with a grand jury subpoena duces tecum for the production of bank records located in the Bahamas and to advance the position that the bank secrecy laws of that country are an absolute bar to compliance with such a subpoena.

witnesses *have* been held in contempt for failure to produce documents and to testify even though they have argued that production or testimony would violate foreign law. Thus, in *Vetco, supra,* the Ninth Circuit upheld contempt penalties against a third party accounting firm, notwithstanding the firm's claim that production of documents would violate Swiss law. Similarly, in *Field, supra,* the Fifth Circuit upheld contempt penalties imposed on an officer of a foreign bank, despite his assertion that compliance with the subpoena would subject him to criminal penalties under the bank secrecy law of the Cayman Islands. As this Court has noted, "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg* v. *Hayes,* 408 U.S. 665, 701 (1972), quoting *United States* v. *Stone,* 429 F.2d 138, 140 (2d Cir. 1970). And the scope of a grand jury's inquiry is not to be limited by forecasts of the probable result of the investigation or by doubts whether any particular individual will be accused of crime. *United States* v. *Calandra, supra,* 414 U.S. at 343; *Blair* v. *United States,* 250 U.S. 273, 282 (1919). Thus, a witness's involvement in the matter under grand jury investigation is immaterial.

b. Petitioner also contends that this Court should resolve the conflict between the decision below and that of the Third Circuit in *In re Grand Jury Proceedings (Schofield I),* 486 F.2d 85 (1973). In *Schofield I,* the court invoked its supervisory authority to require the government in a subpoena enforcement proceeding "to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose" (*id.* at 93). The court recognized that this Court had held in *United States* v. *Dionisio,* 410 U.S. 1 (1973), and *United States* v. *Mara,* 410 U.S. 19 (1973), that

the Fourth Amendment did not require such a showing (486 F.2d at 89). In this case, the Eleventh Circuit, following Fifth Circuit precedent (*In re Grand Jury Investigation (McLean)*, 565 F.2d 318 (5th Cir. 1977)), rejected the *Schofield I* rule. The First, Second,[16] Eighth, and Ninth Circuits also have rejected the rule, while the Tenth Circuit has cited it without discussion. *In re Pantojas*, 628 F.2d 701, 704-705 (1st Cir. 1980); *In re Liberatore*, 574 F.2d 78, 82-83 (2d Cir. 1978); *In re Grand Jury Proceedings (Universal Mfg. Co.)*, 508 F.2d 684, 686 n.2 (8th Cir. 1975);[17] *In re Grand Jury Proceedings (Hergenroeder)*, 555 F.2d 686 (9th Cir. 1977); *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 281 (10th Cir. 1983).[18]

In our view, the Third Circuit's (and, arguably, the Tenth Circuit's) decision to exercise a greater degree of supervisory power over the conduct of grand jury proceedings in the manner described — while unjustified — does not require this Court's review in the instant case. As the Third Circuit recognized, its *Schofield* rule is not constitutionally

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[16]Petitioner asserts (Pet. 10-11) that in *United States* v. *First National City Bank*, *supra*, 396 F.2d at 901, the Second Circuit, while affirming an order requiring a bank to comply with a grand jury subpoena for records in Germany, in violation of German civil law, considered the significance of the documents sought. The court did address the importance of the subject matter of the grand jury investigation (*id.* at 902-903), but nothing in its opinion suggests that its decision turned on a showing by the government of the relevance of the subpoenaed documents to the investigation. In any event, the Second Circuit unequivocally rejected the *Schofield I* rule in *In re Liberatore*, 574 F.2d 78, 82-83 (1978).

[17]The Eighth Circuit declined to adopt the *Schofield I* rule in the cited case, but noted that the government had filed an affidavit substantially meeting the requirements of the rule.

[18]The Bahamas relies (Bah. Br. 10) on a number of additional cases for the proposition that a showing of relevancy was required here. One of these decisions, *In re Special Grand Jury No. 81-1*, 676 F.2d 1005 (1981), was withdrawn by the court (697 F.2d 112 (4th Cir. 1982)). The remaining cases do not involve grand juries and are therefore inapposite.

required. It is not essential that every circuit exercise its supervisory powers in a uniform manner, and thus this Court need not reconcile this particular conflict. This is particularly true here because in *Schofield II (In re Grand Jury Proceedings (Schofield)*, 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975)), the Third Circuit, while adhering to its *Schofield I* rule, made it clear that the showing it will require of the government is minimal.[19]

Thus, even if this case had been litigated in a circuit following the *Schofield* rule, petitioner would not have received any significant information of which it is not already aware. The government has disclosed in this case that the grand jury is conducting a tax and narcotics investigation (R. 3-4; Jan. 1982 Tr. 4). Banking records are essential to a complete tracing of funds and are therefore unquestionably relevant to a tax investigation. Moreover, petitioner has never even suggested that the instant subpoena was issued for an improper purpose. Thus, it is difficult to see how petitioner's position would be aided by the formal filing of an affidavit reciting these same facts.[20]

Finally, review of this particular conflict among the circuits should not be undertaken in this case. The contested

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[19]The court accepted as sufficient a two-paragraph affidavit stating that the grand jury was investigating various violations of federal criminal statutes, including those proscribing perjury and the giving of false declarations; that Schofield had been advised that she was a potential defendant; that it was essential and necessary to the grand jury investigation that Schofield furnish handwriting exemplars and fingerprints; and that the evidence sought would be used solely as a standard of comparison to determine whether or not the witness uttered any forged, falsely made, altered or counterfeited checks (507 F.2d at 966-967).

[20]The government did in fact file a *Schofield*-type affidavit in this case for the district court's in camera inspection. The affidavit was filed under seal and was not relied upon by the district court or the court of appeals (Pet. App. 4a n.3).

grand jury subpoena was issued in September 1981, and to date the grand jury has not been provided with the material it has requested. Further judicial review would confront the grand jury with the imminent running of the statute of limitations as to some of the narcotics offenses under investigation, and the grand jury would have to decide whether to indict without the benefit of all relevant evidence. Review in this case would thus contravene the principles that unnecessary interference with grand jury investigations is to be avoided and that a presumption of regularity attaches to grand jury proceedings. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 139 n.23 (1974); *United States* v. *Calandra*, *supra*, 414 U.S. at 345; *United States* v. *Dionisio*, *supra*, 410 U.S. at 17.

3. The Bahamas also argues (Bah. Br. 11-13) that the courts below should have required the government to seek production through the Bahamian courts. But the government is not required to seek production of documents through an alternative means that is not substantially equivalent to a grand jury subpoena. *United States* v. *Vetco, Inc.*, *supra*, 644 F.2d at 1332-1333. Nor is the government required to make a showing that information sought by grand jury subpoena is not available through some other means. *United States* v. *Mara*, *supra*, 410 U.S. at 21; *United States* v. *Dionisio*, *supra*, 410 U.S. at 17 n.16; *In re Liberatore*, *supra*, 574 F.2d at 83. Thus, at the least, the burden was on petitioner to show that seeking production through the Bahamian courts was equivalent to use of a grand jury subpoena. Petitioner failed to meet that burden. The evidence offered by petitioner itself showed that the Bahamian courts will not order production where the criminal activity under investigation is a crime only under the tax laws of the United States. While the grand jury's investigation in part concerns narcotics offenses, in light of the obvious relevance of the information sought here to a tax

investigation, a Bahamian court might well conclude that the information related only to the tax aspects of the investigation and deny a request for judicial assistance. Nor has the Commonwealth of the Bahamas offered anything to allay this concern. Moreover, the government showed that seeking assistance from the Bahamas could be unduly time consuming and costly.[21] Given these and other circumstances in this case,[22] the courts below were clearly correct in refusing to require the government to seek assistance from the Bahamian courts.

4. Finally, petitioner's position here is contrary to pronouncements of this Court concerning the duty to give evidence before the grand jury. See, *e.g., United States* v. *Calandra, supra,* 414 U.S. at 345; *United States* v. *Dionisio, supra,* 410 U.S. at 9-10; *Piemonte* v. *United States,* 367 U.S. 556, 559 n.2 (1961); *Blair* v. *United States, supra,* 250

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[21]The Bahamas' reliance (Bah. Br. 13) on *Upjohn Co.* v. *United States,* 449 U.S. 383 (1981), in an effort to minimize the significance of this factor, is misplaced. In *Upjohn,* this Court stated that considerations of the government's convenience did not overcome the policies served by the attorney-client privilege (449 U.S. at 396). Here, no recognized domestic policies are served by affording an American citizen a right of privacy in bank records that exceeds the right of privacy recognized in this country. Nor is there any policy reason to accord the American citizen a right to have disclosure ordered only by a Bahamian court; from the bank customer's perspective, there is no material difference between disclosure ordered by such a court and disclosure ordered by an American court.

[22]It is noteworthy that the Bahamas has demonstrated no legitimate interest in restricting the grand jury's access to information concerning an American's domestic tax obligations. Any interest of the Bahamas in enabling an American to use Bahamian banks to obstruct a federal grand jury by depriving it of access to otherwise unprivileged information relating to possible violations of American law is hardly a national interest to which a court of this country should defer. The Bahamas' interest is clearly outweighed when balanced against the American interest in unfettered grand jury investigations and the collection of taxes.

U.S. at 281. These cases make it clear that hardship on a witness does not excuse him from his obligation to provide evidence.[23] Even a well-founded fear for personal safety is not a legal excuse for failure to give evidence. *Piemonte* v. *United States, supra,* 367 U.S. at 559 n.2. It follows that the possibility that petitioner might be subject to criminal sanctions in another country did not preclude enforcement of the instant subpoena.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[23] In *Blair* v. *United States, supra,* 250 U.S. at 281, the Court stated, "[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." The Court also observed that while the duty to give evidence may be "onerous" at times, it is "necessary to the administration of justice" (*ibid.*). In *United States* v. *Calandra, supra,* 414 U.S. at 345, the Court declared, "[t]he duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status. Yet the duty to testify has been regarded as 'so necessary to the administration of justice' that the witness' interest in privacy must yield to the public's overriding interest in full disclosure."

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No. 82-1531

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE:

GRAND JURY PROCEEDINGS

BANK OF NOVA SCOTIA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Pursuant to Sup. Ct. R. 28.1, a list of Petitioner's parents, subsidiaries and affiliates appears as Appendix I to the Petition for Certiorari.

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PETITIONER'S REPLY BRIEF

The Bank of Nova Scotia ("Petitioner") submits this Brief in reply to the Brief for the United States in Opposition, filed by the Department of Justice ("Respondent") on May 25, 1983.

The Petition for Certiorari (the "Petition") presents for review an important and pressing question of federal law that has not been, but should be, answered by this Court. The importance of the question and the fact that it has not been answered by this Court are not challenged. The Petition is opposed on the ground that an alternative question which Respondent proposes does not deserve an answer.

The Petition seeks a determination by this Court of the extent to which a foreign national, subject to the judicial power of the United States only by reason of its lawful presence within the territory of the United States, should be coerced to act unlawfully in the territory of a friendly foreign sovereign, when there has been no showing that the national interest of the United States requires such unlawful action, and when alternative means of serving the national interest are available. The Brief in Opposition does not address this question but seeks to preclude this Court's consideration of it by arguing only that the judicial power exists. The existence of power is not an issue; what constitutes abusive or excessive exercise of power is an issue that requires resolution by this Court.

The question presented for review is framed by the following facts, which are uncontroverted in the record.

1. Petitioner is a Canadian national which maintains establishments for the transaction of a banking business in the United States and in the Bahamas. The conduct of those establishments is controlled by the laws of the respective territorial sovereigns.

2. A federal grand jury is conducting a tax and narcotics investigation in the Southern District of Florida. Petitioner is not a target of that investigation and is not shown or alleged to have had any involvement in the United States with the targets of the investigation or the matters under investigation.

3. The grand jury subpoena in question commands Petitioner to remove from its establishment in the Bahamas and produce in the United States records of accounts maintained in accordance with Bahamian law by targets of the investigation with the Nassau branch of Petitioner.[1] Compliance with the subpoena would require Petitioner to take action in the Bahamas with respect to material physically situated in the Bahamas.

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1 One of the targets is stated to be a citizen and resident of the United States. The nationality and residence of other targets are not disclosed.

4. Compliance with the subpoena is explicitly prohibited by Bahamian law governing the conduct of Petitioner's establishment in the Bahamas.

5. Under Bahamian law, a court in the Bahamas may authorize compliance with the subpoena. Application for such authorization may be made by the United States Government, but there is no procedure by which Petitioner can make such application.[2]

6. Respondent has made no showing that the material sought is relevant or necessary to the grand jury investigation or would be admissible evidence of any crime. Respondent has obtained no order directing a target of the investigation to produce the material. Respondent has made no application to a court in the Bahamas to authorize production. Petitioner has sought the consent of the customers of its Bahamas branch to production; consent was refused.

The Petition shows that, in these circumstances, imposition of contempt penalties by the courts below is a departure from principles declared by this Court, is in conflict with the decisions of other circuits, and creates confusion. No contrary showing is made by the Brief in Opposition. As shown hereafter, Respondent misconstrues the effect of prior decisions by this Court, fails to reconcile the disparate views of the courts of appeal, disregards the record, and presents no credible answer to the plea of Petitioner and others similarly situated for a clear statement of the rules they are required to follow.

A. *The Conflict of the Circuits.* There is no force to Respondent's argument (Govt. Brief p. 9) that the courts of appeal agree that "this issue should be decided by application

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2 Bahamian law and procedure is described by qualified Bahamian counsel. (*See* Graham Aff., Pet. App. 1h-4h). That evidence is consistent with the description of Bahamian law provided by the Attorney General of the Bahamas in the *Amicus* Brief submitted in support of the Petition by the Commonwealth of the Bahamas. The record contains no contrary evidence. The courts below accepted the evidence introduced by Petitioner.

of the Restatement's five-factor balancing test." The divergent decisions of the circuits sufficiently evidence the fact that the test is neither uniformly interpreted nor consistently applied. By way of illustration, one factor, "vital national interests of each of the states", requires definition in the context of cases such as the present one. The United States has a vital national interest in the grand jury system, but an invasion of foreign sovereignty based on speculation as to the possible relevance of documents to a grand jury investigation can scarcely be said to be essential to the function of the system or to a vital national interest of the United States. The vital national interest of the Bahamas is in the preservation of its rules of internal order; it is that interest that should be weighed against the zealous impatience of a U.S. prosecutor with Bahamian laws he finds obnoxious in a particular case.

Respondent refers to no case, nor are we aware of any, in which this Court has adopted Section 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) as an appropriate standard. Its insufficiency in the context of cases such as this one is evidenced by the most recent, proposed revision of the *Restatement of Foreign Relations Law of the United States (Revised)* (Tent. Draft No. 3, 1982).[3]

Respondent's effort to reconcile the divergent decisions of the courts of appeal is equally ineffective. The plain fact is that

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3 The most recent draft of the *Restatement* directs courts to consider the following factors in determining whether to enforce an extraterritorial subpoena:

> In issuing an order directing production of documents or other information located abroad, a court in the United States must take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; in which of the states involved the documents or information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.

Restatement of Foreign Relations Law of the United States (Revised) § 420(1)(c) (Tent. Draft No. 3, 1982).

the Seventh Circuit relieves a witness when compliance with the subpoena would require it to violate the laws of a friendly foreign country, *United States v. First National Bank ("Tripplett")*, 699 F.2d 341 (7th Cir. 1983); the Eleventh Circuit requires compliance. The Third and Tenth Circuits require a showing of relevance to enforce a subpoena, *In Re Grand Jury Proceedings ("Schofield I")*, 486 F.2d 85 (3d Cir. 1973); *In Re Grand Jury Proceedings ("Schofield II")*, 507 F.2d 963 (3d Cir.), *cert denied*. 421 U.S. 1015 (1975); *In Re Grand Jury Subpoena Duces Tecum ("Dorokee")*, 697 F.2d 277 (10th Cir. 1983); the Eleventh Circuit does not. The Second Circuit accepts the proposition that, in cases involving an international conflict of laws, the applicant for the relief bears a heavy burden of demonstrating a preponderant national interest requiring what is recognized to be extraordinary action, *United States v. First National City Bank ("Loveland")*, 396 F.2d 897 (2d Cir. 1968); *Application of Chase Manhattan Bank ("Chase")*, 297 F.2d 611 (2d. Cir. 1962); the Eleventh Circuit will disregard the judicial impingement on international relations on the basis of a prosecutor's generalities.

Respondent concedes that the Seventh Circuit found a bank's status as a "neutral" party "significant" (Govt. Brief at 11), and was influenced by the Bank's efforts to comply with the subpoena. (Govt. Brief at 10). In the instant case, in which Petitioner is not accused of any wrong-doing[4] and has made a good-faith effort to comply with the subpoena[5], it must be

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4 Respondent raises for the first time the argument that "it is hardly clear that petitioner is a completely neutral party." (Govt. Brief at 11, fn. 15). It claims that Petitioner may be "aware" that "at least some of its American customers" may use its Bahamian branch to take advantage of the Bahamian bank secrecy statute. Respondent did not raise this argument below, and presents no evidence in support of this rather tenuous proposition. The record shows that Petitioner is a neutral party and has no "purposeful involvement" in the subject of the grand jury's investigation.

5 Respondent concedes that, at the time of the contempt hearing, Petitioner had sought and not obtained the customer's consent to the release of the documents. (Govt. Brief at 8, fn. 9.) In addition, it relied on the advice of Bahamian counsel that there was no basis in Baha-

acknowledged that the Seventh Circuit utilized standards which were quite different in purpose and effect from those applied by the Eleventh Circuit herein. Indeed, Respondent's argument does not reconcile the Eleventh Circuit's opinion with *Tripplett*, but rather reveals the disparate rationales used by the two circuits.

Similarly, respondent has failed to reconcile the conflicts between the Third and Tenth Circuits and the decision below. Respondent concedes that, based on the *Schofield* rule, the Third Circuit would "exercise a greater degree of supervisory power over the conduct of grand jury proceedings" than would the Eleventh Circuit, but attempts to gloss over this difference by claiming that the Third Circuit's standards are not "constitutionally required". (Govt. Brief at 13-14). Respondent claims that "this Court need not reconcile this particular conflict" (Govt. Brief at 14), but it does not and cannot deny that there is a real conflict between the Eleventh and Third Circuits, and that an application of the Third Circuit's standards in this matter would have changed the outcome of the contempt proceedings herein.[6] Respondent virtually ignores the fact that

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mian statutory or common law which would permit an application by Petitioner for the release of the documents. (Graham Aff., Pet. App. 3h, ¶ 6). In contrast, Respondent concedes that it has the ability to apply to a Bahamian court for an order permitting the release of the documents, but it has failed to do so. Respondent claims that it is not required to show that the information sought by a grand jury subpoena is unavailable through other means, and cites *United States v. Mara*, 410 U.S. 19, 21 (1973), *United States v. Dionisio*, 410 U.S. 1, 17 n. 16 (1973) and *In Re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978) in support of this proposition. (Govt. Brief at 15). In fact, none of the cases cited by Respondent concerns the enforcement of an extraterritorial subpoena, or the enforcement of any subpoena which would subject the witness to criminal penalties in another jurisdiction. In the instant case, Petitioner has done everything in its power to procure the documents through legal channels, and Respondent has shown an unwillingness to procure the documents through a route which is undeniably available to it.

6 Respondent contends that its disclosure that the "grand jury is conducting a tax and narcotics investigation" would have fulfilled the standards set forth by the Third Circuit in *Schofield II* since

the Tenth Circuit has recently adopted the *Schofield* requirements. It claims, "[T]he Tenth Circuit has cited [*Schofield*] without discussion". (Govt. Brief at 13). An honest reading of *Dorokee*, however, reveals that the Tenth Circuit required the government to make a "preliminary demonstration that the material sought is relevant to a proper grand jury investigation". *Id.*, 697 F.2d at 281. That standard, adopted by both the Third and Tenth Circuits, is in stark conflict with the rationale of the court below.

In addition, Respondent does not attempt to reconcile the Second Circuit's rationale in *Loveland* or *Chase* with the decision below, claiming without any explanation that the Second Circuit has "receded" from its position.[7] (Govt. Brief at 10, fn. 13). Respondent's brief serves to highlight the irreconcilable conflict between the decisions of the Seventh, Third, Tenth and Second Circuits and the decision below.

B. *Conflict with Prior Decisions of this Court.* The unmistakable effect of the decision by the court below is to punish Petitioner for its failure to act in the Bahamas in a manner which federal law would not permit it to act, *mutatis mutandis*, in the United States. The decisions of this Court, cited and

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"[b]anking records are essential to a complete tracing of funds. . . ." (Govt. Brief at 14.) Such a general statement by Respondent could not possibly have fulfilled the *Schofield II* standards, which require a particularized showing of relevance *in each case*. *Id.*, 507 F.2d at 966. Respondent's affidavit in this matter was filed under seal and was not considered by either the district court or the court of appeals below, (Govt. Brief at 14, fn. 20) and so is not properly before this Court.

7 In *Loveland*, the Second Circuit expressly stated that compliance with the subpoena would not "require the violation of the criminal law of a foreign power" nor "conflict with the public policy of a foreign state as expressed in legislation", 396 F.2d. at 901, and observed that the German government "voiced no opposition to Citibank's production of the subpoenaed records." 396 F.2d. at 904. In this case, the courts below expressly recognized that compliance with the subpoena would involve a *prima facie* violation of Bahamian criminal law, and the Commonwealth of the Bahamas has vehemently voiced its opposition. *See Amicus* Brief at 3-9.

discussed at pp. 6-8 of the Petition, establish a principle of equality of treatment. It is this principle that is offended by the decision of the courts below which orders Petitioner to do in the Bahamas what it would not be permitted to do in the United States pursuant to order of a Bahamian Court. The inequity of the position taken by the courts below was not lost on the Government of the Commonwealth of the Bahamas. (*Amicus* Brief at 8-9; Pet. at 5).

The Brief in Opposition does not question the departure from principle. It seeks to distract the Court by a semantic, but not an analytical, discussion of the act of state doctrine. Contrary to Respondent's contentions, Petitioner has never contended that the decision below violated the act of state doctrine *per se* or that *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers ("Rogers")*, 357 U.S. 197 (1958) constituted an "absolute bar to summons enforcement and contempt sanctions." (Govt. Brief at 7.) Petitioner simply noted the evident fact that, as a corollary to the act of state doctrine, this Court has expressed extreme reluctance to enter any order which would obligate a party to commit an act in a foreign country in violation of the laws or public policies of that nation. (Pet. at 6.) *Accord, United States v. First National City Bank ("Omar")*, 379 U.S. 378, 384-85 (1965) (majority noted that, if it were shown that the decision was in violation of foreign law, the district court should review the advisability of its order). Thus, the decision below is at odds with the principle of respect for territorial integrity.

In these circumstances, it is impossible for laymen to know the laws that they are required to obey. It is impossible for their legal advisors to provide positive and certain counsel. There are no clear or certain standards by which a company doing business in this country can predict the legal ramifications of its conduct, and there are no clear or certain standards by which a court may judge the propriety of that conduct.

C. The decision below will impede rather than facilitate grand jury investigations. In this case, Respondent and the court below have emphasized the need to facilitate investiga-

tion and prosecution of violations of United States law. That interest, we submit, is clearly compromised by the absence of any definitive statement by this Court. Petitioner, and those similarly situated, will be required to litigate subpoenas such as that in this case in order to obtain whatever protection is available on the grounds of comity, sovereign compulsion and due process.

The resolution of this issue is in the interest of Respondent as well as that of Petitioner. Respondent has cited a number of cases, including *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972), *United States v. Calandra*, 414 U.S. 338, 343 (1974) and *Blair v. United States*, 250 U.S. 273, 282 (1919), in support of the proposition that grand jury investigations are extremely important and should not be subject to unnecessary and unreasonable restraints. (Govt. Brief at 12). Petitioner agrees with this proposition, but points out that the uncertainty surrounding the standards to be utilized in enforcing extraterritorial subpoenas results in greater obstruction of grand jury investigations than would the application of virtually any set of standards authoritatively established by this Court. Litigation on the enforceability of each extraterritorial grand jury subpoena imposes a burden that cannot be justified either monetarily or in the interest of judicial economy. Petitioner and others similarly situated have no guidelines by which they can determine which extraterritorial subpoenas represent a proper exercise of judicial power. The court below asserted, "[W]e are not willing to emasculate the grand jury process. . .", (Pet. App. at 13a), but it has exacerbated the confusion in the area to such an extent that its decision will create quite the opposite effect.

D. *The lower courts lack needed guidance.* The standards adopted by various circuits for the enforcement of extraterritorial subpoenas are in sharp disagreement. Respondent's Brief in Opposition fails to reconcile the conflicting views of the Eleventh, Seventh, Second, Third and Tenth Circuits. It is difficult to conceive of a more appropriate exercise of this Court's power of supervision to resolve the incompatibility of decisions.

In this case, a noncitizen of this country, which is subject to process of our courts only because it lawfully conducts business here, is victimized by a conflict of sovereigns. Had this subpoena been issued in the Seventh, Second, Third or Tenth Circuit, we believe that the result would have been quite different. In the circumstances of this case, the courts below departed from the accepted and usual course of judicial proceedings by imposing contempt penalties.

Conclusion

The Petition seeks an answer to a question of federal law that has not heretofore been answered by this Court. The Brief in Opposition does not and cannot show that the question has been answered by this Court. The importance of the question is demonstrated by Petitioner, by the *Amicus* Brief submitted by the Commonwealth of the Bahamas in support of the Petition and by the most recent Tentative Draft of the *Restatement*. The Brief in Opposition does not contradict the importance of the question presented by the Petition. Instead, it seeks to persuade the Court that a significantly different question framed by Respondent does not merit an answer by this Court.

To give the question presented by the Petition its proper consideration, to answer recurring questions, and to render a fair and equitable decision, this Court should grant the Petition for Certiorari and reverse the decisions of the district court and court of appeals.

Dated: New York, New York
June 3, 1983

Respectfully submitted,

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No. 82-1531

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

IN RE: GRAND JURY PROCEEDINGS

BANK OF NOVA SCOTIA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE COMMONWEALTH OF THE BAHAMAS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE COMMONWEALTH OF THE BAHAMAS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Commonwealth of the Bahamas is an independent, sovereign archipelagic nation of approximately 70,000 square miles, located in the western Atlantic Ocean, points of which are less than fifty miles from the east coast of the United States. A former British colony, the Commonwealth will celebrate in July, 1983 the tenth anniversary of its independence. The Bahamas enjoys a democratic form of government patterned after the British system, with an independent judiciary and a bicameral legislature composed of a Senate and a House of Assembly. In fact, an elected House of Assembly has

existed as part of the government of the Bahamas for more than 250 years. As in other western countries, the Bahamas Parliament has enacted legislation covering a wide variety of subjects in both civil and criminal law. Among this legislation is the Bank and Trust Companies Regulation Act, which prohibits the disclosure of the confidential records ordered by the lower court in this case, except by procedures authorized by the Act.

The Commonwealth is vitally interested in the decision of the court below in this matter. Unless reversed by this Court, the ruling would authorize any American grand jury or investigative authority to require a foreign national to violate the criminal law of the Bahamas or any other country and to reveal confidential records located there, despite the absence of any finding that the records are relevant or necessary and despite the availability of alternative means to obtain the records at issue. Such a result not only would conflict with the decisions of other federal circuit courts of appeals and this Court, but also would violate fundamental principles of sovereignty recognized by international law and would threaten relations between the United States and other nations. As the Department of Justice itself has recognized, the views of foreign governments concerning issues such as those raised in this case are "entitled to appropriate deference and weight." *See* Statement of Interest of United States in *Westinghouse Electric Corp. v. Rio Algom Ltd.* (May 6, 1980), reprinted at 1980 Trade Reg. Rep. (CCH) ¶ 50,416.

The Commonwealth accordingly has a vital interest in prompt review by this Court of the decision below, and supports the petition for a writ of *certiorari*.

CONSENT OF THE PARTIES

This *amicus curiae* brief is being filed with the consent of both parties, whose letters of consent are on file with the Clerk of the Court.

ARGUMENT

I. The Decision Below Violates Fundamental Principles of International Law and Threatens Relations Between the United States and Other Sovereign Nations.

The court below affirmed a civil contempt order against The Bank of Nova Scotia, a Canadian bank with branches in the United States and an office separately registered under the laws of the Bahamas. The order required the Bank to comply with an American grand jury demand that it produce bank records located in the Bahamas concerning a Bahamian bank customer who was under investigation by a U.S. grand jury. The Court of Appeals recognized explicitly that the Commonwealth's law prohibits the disclosure of such private bank records under the Banks and Trust Companies Regulation Act, and that compliance with the American court order would require violation of Bahamian criminal law which could lead to criminal sanctions against the Bank. 691 F.2d at 1386. The court further recognized that the U.S. government had made no demonstration that the records were necessary or even relevant to the investigation. *Id.* at 1387. The court nevertheless held that the subpoena should be enforced and the Bank should be held in contempt, although the government had made no attempt to seek to obtain the records through a Bahamian court order or other means. *Id.* at 1390.

The consequences of this ruling for foreign governments such as the Commonwealth of the Bahamas are serious and far-reaching. The Court of Appeals' decision effectively carves out a unilateral exception to criminal laws enacted by sovereign foreign governments prohibiting the disclosure of confidential records. It arrogates to the American courts the unique power to command that a foreign national disobey the criminal law of another sovereign whenever an American grand jury so requests, regardless of whether the records requested are shown

to be relevant or necessary. It authorizes American investigative authorities to extend the reach of their enforcement power into the territory of other independent nations, without even attempting to follow the procedural rules established by these nations themselves.

Such a result defies fundamental legal principles acknowledged both by this Court and by international law. This Court has long recognized that "the jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute," and that all exceptions to the "full and complete power of a nation within its own territory must be traced up to the consent of the nation itself." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116, 136 (1812) (Marshall, C.J.). *Accord, e.g., Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); I.L. Oppenheim, *International Law* § 15 (8th ed., Lauterpacht, 1955). This Court has similarly acknowledged that a country cannot effectively extend its enforcement jurisdiction "beyond its own territory" into another sovereign nation, at least where the result is to compel conduct in violation of foreign law. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824). *Accord, e.g., FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1317-18 (D.C. Cir. 1980); *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] 1 All E.R. 434, 447-48, 460, 466; Report of the Fifty-First Conference, International Law Association, 403, 407 (Tokyo 1964) ("Tokyo Conference"). Yet this is precisely what the court below required, in flagrant disregard of Bahamian law and international legal principles.

The decision below conflicts directly with the rulings of other federal circuit courts of appeals which, unlike the court below, have respected these applicable legal principles and refused to order conduct abroad in violation of foreign law. For example, in *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), the Court of Appeals affirmed an order modifying a grand jury

subpoena in order to prevent the subpoenaed disclosure of bank records which would have violated Panamanian law. The court explained that "fundamental principles of international comity" mandated that American courts refrain from requiring parties to violate or circumvent other nations' confidentiality laws. *Id.* at 613. *Accord, e.g., Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (modifying subpoena to prevent production of documents located in Canada which would have violated Canadian law); *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298, 318, 320 (D.D.C. 1960) (restricting scope of grand jury subpoena to records located in United States, at least until government demonstrated specific need for foreign documents). Other courts have similarly refused to impose sanctions on parties unable to comply with subpoenas or other document requests because of foreign laws prohibiting disclosure, contrary to the decision of the court below. *E.g., United States v. First National Bank of Chicago*, 699 F.2d 341 (7th Cir. 1983); *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 563 F.2d 992 (10th Cir. 1977). This conflict between the principles recognized both by American and foreign authorities and the decision below warrants review and reversal by this Court.

Beyond this clash with fundamental precepts of international law, the decision below also has serious implications for relations between the United States and other countries. Many nations have laws which protect the confidentiality or otherwise prohibit disclosure of bank and other records. In addition to the Commonwealth of the Bahamas, these nations include such close American allies as Great Britain, Canada, and West Germany.[1] Previous

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[1] A number of such statutes are compiled in Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 Ford. L. Rev. 877, 879-80 n.1 (1982). *See, e.g.*, Law of May 24, 1965, Bundesgesetzblatt, Teil II [BGB 2] 835 (W.Ger.); Protection of Trading

attempts by American authorities to force disclosure in violation of such statutes have led to vehement international protests from governments around the globe. *See, e.g.*, Tokyo Conference, *supra*, at 403-06, 565-92; *Rio Tinto Zinc*, *supra*, 1 All E.R. at 447-48, 460; *FTC v. Compagnie de Saint-Gobain*, *supra*, 636 F.2d at 1325. In fact, the American Law Institute has recently reported that "no aspect of the extension of the American legal system beyond the territorial frontiers of the United States has given rise to so much friction" as American demands for documents located abroad, and that some 15 countries have adopted legislation "expressly designed to counter [such] U.S. efforts." Restatement of Foreign Relations Law of the United States (Revised) § 420, Reporters' Notes at 18 n.1 (Tent. Draft 3, 1982).[2]

If permitted to stand, therefore, the decision below cannot help but trigger a new round of diplomatic controversy and threaten to disrupt relations between the United States and other countries. For example, American efforts to resolve the problems posed by extraterritorial discovery requests through treaties or other cooperative means, which are currently under way, will be impeded by the understandably negative reaction of other

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Interests Act, 1980, ch. 11 (U.K.); Business Records Protection Act, Ont. Rev. Stat. ch. 54, § 1 (1970); Economic Competition Act, 1956 Staatsblad voor het Koninkrijk der Nederlanden [STB.] 401, art. 39, amended by Act of July 16, 1958, STB. 413 (Neth.) (English translation at 5 OECD, Guide to Legislation on Restrictive Business Practices 1, 18-19) (June 1972). *See also* Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation*, 88 Yale L.J. 612, 613 nn.4 & 5 (1979).

[2] *See also id.* at 20-22 n.3. Indeed, the current draft of the Restatement specifically provides, contrary to the decision below, that where disclosure of documents located in another country would violate that country's law, an American court should generally limit itself to ordering a party to "make a good faith effort to secure permission from foreign authorities to make the information available," and should not ordinarily impose contempt or other sanctions. *Id.*, § 420(2).

governments to such flagrant unilateral action as in the instant case. *See generally* Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 Va. J. Intl. Law 747, 770-74 (1974) (suggesting increased use of treaties and other international agreements concerning document production). Review of the Court of Appeals' ruling at the highest possible level is accordingly necessary.

These concerns are aptly illustrated in this case. The decision of the court below conflicts directly with the criminal nondisclosure provisions of banking regulation legislation enacted by the Parliament of the Commonwealth of the Bahamas.[3] This legislation is based upon the recognized Anglo-American legal principle that "[i]nviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers." *Peterson v. Idaho First National Bank*, 83 Idaho 578, 581, 367 P.2d 284, 290 (1961). *See* 5A Michie, *Banks and Banking* § 1 at 18 (1973 ed.).

Enacted in 1965 and strengthened in 1980, the Commonwealth's law strictly limits access to information concerning a particular depositor's account in any bank. Indeed, even the Inspector of Banks of the Bahamas cannot obtain such records unless he procures an order from the Supreme Court of the Commonwealth ruling that such access is necessary and that there are "no other means of obtaining the information required." Banks and Trust Companies Regulation Act of 1965, 1965 Bah. Act. No.

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[3] *See* Section 10 of the Banks and Trust Companies Regulation Act of 1965, 1965 Bah. Acts No. 64, as Amended by the Banks and Trust Companies Regulation (Amendment) Act, 1980, 1980 Bahamian Act No. 3; Section 19 of the Banks Act, III Bahamian Rev. Laws, c. 96 (1965), as amended by the Banks Amendment Act of 1980. The texts of § 10 and § 19 are identical. Both were initially enacted in 1965 while the Bahamas were still under British rule, and were subsequently reenacted by the Bahamian Parliament after independence.

64, § 8-(3). As discussed further in Section II below, such an order would similarly have been available to the United States in the instant case, but the government and both courts below chose to ignore this established procedure under Bahamian law.

The United States Congress has recognized and protected privacy interests similar to those protected under Bahamian law in legislation such as the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, and the Privacy Act, 5 U.S.C. § 552a *et seq.*, which similarly mandate that specific procedural requirements be met before disclosure may be ordered. *E.g.*, 5 U.S.C. § 552a(b); 12 U.S.C. § 3407. Even if the Commonwealth's laws were based on a different "economic and legal philosophy" than that of this country, of course, American courts would nonetheless have a clear "obligation to respect the laws of other sovereign states." *Chase Manhattan Bank, supra*, 297 F.2d at 613. The court in this case, however, failed to meet this fundamental obligation.

The affront to the Commonwealth represented by the decision below can best be appreciated by considering the reaction of the United States if the situation were reversed. Suppose that a Bahamian investigator compelled a visiting United States official to surrender documents classified by Executive Order or protected under the Privacy Act. Or suppose that a Bahamian court required the Chase Manhattan Bank or the City National Bank to produce to Bahamian investigators legally privileged documents located in New York, simply because the Bahamian authorities had served a subpoena upon the Nassau branches of the U.S. banks.[4] Suppose further that

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[4] Indeed, based upon the logic of the ruling of the court below, the Bahamian courts could require a visiting American attorney to surrender documents or give testimony in direct violation of the attorney-client privilege, the importance of which has recently been reaffirmed by this Court. *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

the Bahamian investigators had not even made a determination that the confidential information at issue was relevant or necessary to their functions, and had made no effort to seek such materials through the United States courts. The United States would be justifiably outraged by such a blatant abuse of Bahamian authority. The Commonwealth of the Bahamas understandably has the same reaction to the decision of the court below, and respectfully requests that this Court review that ruling.

II. The Court Below Failed to Fulfill Its Obligation to Seek to Avoid Conflict with the Law of a Foreign Sovereign.

Precisely because of the international implications which may result from decisions concerning foreign affairs, for which this Court has recognized that the judiciary has "neither the aptitude, facilities nor responsibility," *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948), the federal courts have long adhered to the rule that they must make every effort to "minimize the possible conflict between [their] orders and the law of a foreign state affected by [their] decisions." *United States v. First National Bank*, 396 F.2d 897, 902 (2d Cir. 1968). Indeed, even when conduct committed or ordered by another country directly violates American substantive law—unlike the situation in this case—this Court has ruled that the judiciary should avoid "passing on the validity of foreign acts of state." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). *Accord, e.g., Timberlane Co. v. Bank of America*, 549 F.2d 597, 605, 606 (9th Cir. 1976).

In this case, however, the court below barely acknowledged its duty to consider the international implications of its ruling, and did not hesitate to render a decision which the court itself recognized as an "affront to the Bahamas." 691 F.2d at 1390. In particular, the Court of Appeals completely ignored several standards and proce-

dures recognized by the courts in this country, including this Court, which could have avoided conflict with the laws of the Commonwealth.

First, courts confronted with situations such as the instant case have initially sought to determine whether the documents at issue were relevant and necessary before considering whether attempts should be made to produce them in violation of foreign law. *Compare, e.g., Trade Development Bank v. Continental Ins. Co.*, 469 F.2d 35, 41 (2d Cir. 1972), *with United States v. Vetco, Inc.*, 644 F.2d 1324, 1332 (9th Cir. 1981). This principle stems from the decision of this Court in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). *See In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1146, 1154 (N.D. Ill. 1979) (holding that *Societe* requires that the documents at issue be "crucial to the determination of a key issue in the litigation").

In this case, however, the court below pointedly refused even to consider the question of the relevance of the documents at issue, despite its recognition that other courts routinely require a showing of relevance even where no specific confidentiality interests are at stake. *See In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973) (cited at 691 F.2d at 1387). The court below similarly mentioned, but then proceeded to ignore, the rule established in another Circuit that an "important need" must be shown for documents requested by a grand jury where another confidentiality rule, the attorney-client privilege, is at stake. *See In re Special Grand Jury No. 81-1*, 676 F.2d 1005, 1010-11 (4th Cir. 1981) (cited at 691 F.2d 1387 n.5).[5] In light of the comparable importance of the confidentiality provisions of the Commonwealth's bank-

[5] Indeed, the court below did not even acknowledge the specific holding of the Fourth Circuit, but characterized the decision as simply "reserving [the] question of whether [a] preliminary showing must be made in every case" to justify a grand jury subpoena. 691 F.2d at 1387 n.5.

ing laws, there can be no justification for this failure by the court below.

Second, the Court of Appeals also failed to follow the holding of this Court in *Societe Internationale*, *supra*. That decision explained that while American courts may seek to require parties to comply with discovery orders "to the maximum of their ability," sanctions cannot be imposed where a party had sought to comply in good faith but could not do so because of foreign confidentiality laws. *Id.* at 205. Following *Societe*, the appellate courts have consistently ruled that before considering the imposition of sanctions or other steps to force violation of a foreign privacy law, the lower courts should direct parties before them to make all good faith efforts to comply with production requests, such as applying for a waiver of the nondisclosure law or cooperating with American governmental efforts to obtain such a waiver. *E.g.*, *CAB v. Deutsche Lufthansa Aktiengesellschaft*, 591 F.2d 951, 953 (D.C. Cir. 1979); *SEC v. Minas de Artemisa*, 150 F.2d 215, 218 (9th Cir. 1945).

In this case, the court below asserted that the bank had failed to make such good faith efforts. 691 F.2d at 1389. *But see* Petition for a Writ of Certiorari at 3. The lower courts ignored, however, the evidence that the Bank may not have had standing to seek an order of judicial assistance in a situation such as this. *Id.* at 3h (Aff. of P. Graham). If the Court of Appeals had any doubt about this, or if it felt that other options were open to the Bank, it should have remanded with directions that an order be entered requiring the Bank to make all available good faith efforts, as in *First National Bank*, *supra*, 699 F.2d at 346. Instead, the court chose to require violation of the Commonwealth's confidentiality statute, contrary to its obligation to avoid such a conflict.

In provoking such a confrontation with the laws of another sovereign state, the court below also chose to ignore a third alternative employed by the courts in such

situations: directing that the investigative authorities utilize available procedures abroad for obtaining an exemption from confidentiality statutes. *See, e.g., Ings, supra*, 282 F.2d at 152-53. Under Bahamian law, a party who requires documents protected by the banking confidentiality provisions may seek such an order from the Bahamian courts. Banks and Trust Companies Regulation (Amendment) Act of 1980, 1980 Bah. Act No. 3, § 10(1)(iii).[6] The court below was apparently confused concerning the availability of such an order to obtain the documents at issue, recognizing on the one hand that a court in the Commonwealth "would be able to order production," but nevertheless expressing uncertainty as to whether disclosure would be ordered in this case because American tax laws were involved. 691 F.2d at 1391.

Even assuming that the lower court was correct that a Bahamian court might be reluctant to order production where an investigation is for tax purposes only, however, the record below demonstrates that since the investiga-

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[6] A recent U.S. Congressional study confirms that Bahamian authorities have been cooperative regarding requests for information protected by bank secrecy laws:

> Bahamian law does provide for the lifting of bank secrecy when an attorney petitions the Supreme Court for a court order releasing requested documents. . . .
>
> U.S. Embassy officials in Nassau confirm that requests made to them are few—only three in one recent 12-month period. Further, interviews demonstrate that U.S. agencies are woefully ignorant of proper procedures. Requests are made improperly, for example, directly to the Attorney General. Yet even though procedurally such requests should be denied, in each case of a U.S. criminal matter information was supposedly forthcoming within a few weeks. Thus the administrative perogative [sic] was exercised in favor of the U.S. even when the U.S. agency failed to conform to Bahamian law with respect to request channels.

Staff Study, *Crime and Secrecy: The Use of Offshore Banks and Companies*, S. Prt. 98-21, Perm. Subcomm. on Investig., Sen. Comm. on Govt. Affairs, 98th Cong., 1st Sess. 58 (1983).

tion at issue also concerned violations of American criminal laws, an order for production would be available. *See* Affidavit of P. Graham ¶ 8, App. H to Petition for a Writ of Certiorari at 3h.

The court below appeared to imply, however, that it would not require the pursuit of such alternative means because such a course could somehow be considered a "greater interference with foreign relations than the procedures employed here," and because of "the cost in time and money." 691 F.2d at 1388, 1390. Such attempted rationales cannot justify the blatant disrespect for Bahamian procedures displayed by the Court of Appeals. There is simply no basis for the suggestion that requiring investigators to pursue the normal, accepted judicial procedures in the Bahamas to seek confidential records located there would somehow constitute a "greater interference with foreign relations" than unilaterally defying a foreign country's criminal law. Indeed, this notion reflects the very lack of appreciation for the international implications of its decision which should have impelled greater caution by the court below in the first place.

Nor can considerations of time and expense excuse the court's conduct. Even apart from the great expenditure of time and money which has already occurred in this case, this Court has recognized that where American confidentiality concerns are at stake, such "considerations of convenience do not overcome the policies served." *Upjohn*, *supra*, 449 U.S. at 396 (attorney-client privilege). Surely the democratically-enacted statutes of another sovereign state deserve equal respect. The lower court's failure to seek to employ available alternative means to avoid conflict with the Commonwealth's statutes warrants review by this Court.

CONCLUSION

The position of the Commonwealth of the Bahamas in this case was aptly summarized by the Prime Minister of the Province of Ontario in a similar situation 35 years ago:

> I recognize that in population Ontario is a very small jurisdiction compared with that of the United States. Nevertheless, I trust that no citizen of the United States will forget that Canadians are just as proud of their own nationality and just as jealous of their own sovereignty as any citizen of their own country. I hope that the government of the United States will see fit to withdraw these proceedings and follow the course which is in keeping with that close international friendship which has been an example to the whole world. [Tokyo Conference, *supra*, at 568.]

In that instance, the potential international conflict was resolved without violating Canadian law or sovereignty. *Id.* at 568-69. The Commonwealth of the Bahamas hopes that the same result will obtain here.

To that end, and in light of the conflict between the decision below and fundamental legal principles recognized by the courts both in this country and abroad, the Commonwealth urges that this Court grant a writ of *certiorari* and reverse the decision below.

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CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served by mailing three copies of the foregoing Brief of the Commonwealth of the Bahamas as Amicus Curiae in Support of Petition for a Writ of Certiorari by first class mail, postage prepaid, this 14th day of April, 1983, to each of the following:

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